(1)

No. 93-609

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IN THE

Supreme Court of the United States

October Term 1993

FIRST REPUBLICBANK CORPORATION,
IFRB CORPORATION,
MORGAN STANLEY & CO. INCORPORATED,
GOLDMAN, SACHS & CO.,
ERNST & YOUNG,
SALOMON BROTHERS INC,

Petitioners,

v.

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004

CARRINGTON, COLEMAN
SLOMAN & BLUMENTHAL, L.L.P.
200 Crescent Court, Ste. 1500
Dallas, Texas 75201

Attorneys for Goldman, Sachs & Co.

ERNST & YOUNG
380 Madison Avenue
New York, New York 10017

WEIL, GOTSHAL & MANGES
700 Louisiana, Suite 1600
Houston, Texas 77002

Attorneys for Ernst & Young

JAMES W.B. BENKARD*
Hannah Berkowitz
Vincent T. Chang
Davis Polk & Wardwell
450 Lexington Avenue
New York, New York 10017
(212) 450-4000

HUTCHESON & GRUNDY, L.L.P.
901 Main Street, Suite 6200
Dallas, Texas 75202

Attorneys for Morgan Stanley & Co. Incorporated

WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171-0149

FIGARI & DAVENPORT, L.L.P.
901 Main Street, Suite 4800
Dallas, Texas 75202

Attorneys for Salomon Brothers Inc

* *Counsel of Record*

October 18, 1993

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QUESTION PRESENTED

Whether Section 27A(b) of the Securities Exchange Act of 1934, to the extent that it purports to require reinstatement of Section 10(b) actions dismissed with prejudice pursuant to judgments that became final prior to the enactment of Section 27A(b), contravenes the separation of powers doctrine and the due process clause of the United States Constitution.

LIST OF PARTIES

The following party was Plaintiff below and is Respondent before this Court:

Pacific Mutual Life Insurance Company

The following parties[1] were Defendants below and are Petitioners[2] before this Court:

Morgan Stanley & Co. Incorporated;
Goldman, Sachs & Co.
Ernst & Young, a Partnership;
Salomon Brothers Inc

Pursuant to Supreme Court Rule 29.4(b), Petitioners state that the constitutionality of an Act of Congress was drawn into question in the United States Court of Appeals for the Fifth Circuit. The United States intervened in the action, filed a brief in the Fifth Circuit and appeared at oral argument.

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1. First Republicbank Corp. and IFRB Corp. appeared in the caption of the opinion below, but were not parties to the proceeding in the United States Court of Appeals for the Fifth Circuit.

2. Pursuant to Supreme Court Rule 29.1, the parent or subsidiary companies of each Petitioner, other than wholly owned subsidiaries are as follows: Morgan Stanley Group Inc. is the parent of Morgan Stanley & Co. Incorporated; Goldman, Sachs & Co. is a partnership; Ernst & Young is a partnership; Salomon Inc is the parent of Salomon Brothers Inc.

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IN THE

Supreme Court of the United States

October Term 1993

FIRST REPUBLICBANK CORPORATION,
IFRB CORPORATION,
MORGAN STANLEY & CO. INCORPORATED,
GOLDMAN, SACHS & CO.,
ERNST & YOUNG,
SALOMON BROTHERS INC,

Petitioners,

v.

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit, filed July 20, 1993.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is reported at 997 F.2d 39 and is reprinted in the Appendix (''App.'') accompanying this Petition at pages A-1 to 35. The opinion of the United States District Court for the Northern District of Texas (Sanders, C.J.) is reported at 806 F. Supp. 108 and is reprinted at App. B-1 to 15.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l), which permits review by writ of certiorari before or after rendition of a judgment or decree by a United States Court of Appeals.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, section 1, of the United States Constitution states, in pertinent part:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

The Fifth Amendment to the United States Constitution states, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 476 of the FDIC Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236, 2387 (1991), codified as Section 27A of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1 (Supp. III 1991) (''Section 27A''), provides in pertinent part:

> (b) Effect on dismissed causes of action.
>
> Any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991 —
>
> (1) which was dismissed as time-barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,

> shall be reinstated on motion by the plaintiff not later than 60 days after Dec. 19, 1991.

STATEMENT OF THE CASE

For more than 200 years, it has been settled law that Congress may not strip a private litigant of the right to a final judgment rendered by a court of the United States. This principle is premised on the separation of powers and due process doctrines that are as old as the Republic itself.

The Fifth Circuit has now breached this founding principle, brushing aside binding precedent of this Court as well as numerous decisions of other federal tribunals, and held that Section 27A(b) may resurrect a claim that had been finally dismissed, and as to which the time to appeal had expired.

Two weeks after the Fifth Circuit's decision, the Sixth Circuit reached the diametrically opposite result on the very same statute. Analyzing the same issue and the same cases, the Sixth Circuit explicitly rejected the holding of the Fifth Circuit and concluded that Section 27A(b) was ''an unconstitutional usurpation of the judiciary power.'' (*Plaut* v. *Spendthrift Farms, Inc.*, 1 F.3d 1487, 1499 (6th Cir. 1993)).

In light of this stark conflict between two Circuits on issues of fundamental importance to our federal system of government, Petitioners respectfully urge the Court to grant the writ of certiorari sought by this Petition. This case enables the Court not only to clarify an important question of federal securities law, but also to reaffirm essential principles of constitutional law that have endured for centuries.

Initial Proceedings

On March 1, 1991, Respondent Pacific Mutual Life Insurance Company (''Respondent'' or ''Pacific Mutual'') commenced this action alleging claims based on Section 10(b) of the Securities Exchange Act of 1934 (the ''Exchange Act''), 15 U.S.C. § 78j(b), Rule 10b-5, 17 C.F.R. § 240.10b-5,

promulgated thereunder, and common law fraud arising out of Respondent's 1987 purchases of debt instruments issued by Interfirst Corporation.

On June 20, 1991, in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991), this Court held that Section 10(b) actions must be commenced within one year of discovery of the facts constituting the alleged violation and not later than three years after such alleged violation. *Id.* at 2782. This Court applied this limitations period to the claims of the plaintiffs in *Lampf*.

In another decision issued on the same day, *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991), this Court held that when a principle of law is applied to the parties in the case before the Court, that principle also must be applied to all similarly situated parties in all other pending proceedings where such application is not barred by procedural requirements or final judgments. *Id.* at 2448 (Souter, J.). *See Harper* v. *Virginia Dept. of Taxation*, 113 S. Ct. 2510, 2517 (1993) (''[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review . . .'').

Applying the holdings of this Court in *Lampf* and *Beam*, in a Memorandum Opinion and Order dated August 15, 1991, the District Court (Sanders, C.J.) dismissed with prejudice Pacific Mutual's Section 10(b) claim as time-barred and dismissed without prejudice the pendent state law claims. On August 16, 1991, the District Court's Order was entered as a final judgment pursuant to Fed. R. Civ. P. 58 and 79(a). Respondent did not appeal from that Order, and the time for an appeal expired.

Enactment of Section 27A

In reaction to *Lampf* and *Beam*, proposals to replace the ''one-year/three-year'' limitations period with a longer statute of limitations were introduced in Congress, but no such

proposed legislation was passed. Instead, a compromise addressing only cases pending at the time *Lampf* was decided was enacted into law on December 19, 1991. That law, codified as Section 27A of the Exchange Act, does not alter the limitations period of *Lampf*. Instead, it directs that the *Lampf* decision be disregarded in any private civil action commenced on or before June 19, 1991 (the last business day before the rulings in *Lampf* and *Beam* were announced), and that limitations rules pre-dating *Lampf* be applied to the action, regardless of whether the action was still pending, or had been dismissed by a final judgment that was no longer subject to appeal, on the effective date of the new legislation.

Section 27A(b), the only provision of the statute at issue in this case, provides that any private civil action arising under Section 10(b) that was commenced on or before June 19, 1991, that was dismissed as time-barred subsequent to June 19, 1991, and that would have been timely filed under the limitations period provided by the laws in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, ''shall be reinstated on motion by plaintiff not later than 60 days after the date of enactment of this section.'' Thus, Section 27A(b) purports to direct the federal courts (1) to set aside orders dismissing Section 10(b) claims as time-barred that had ripened into final judgments from which the time to appeal has expired prior to the effective date of Section 27A; and (2) to apply case law discredited by *Lampf*, contrary to the holding in *Beam* that a rule of federal law applied to the parties before this Court must be given retroactive effect in all pending cases.

The Decisions Below

On January 31, 1992, more than six months after the entry of the final judgment and order dismissing its action, Respondent filed a motion to reinstate that action pursuant to Section 27A(b). In a Memorandum Opinion and Order dated July 13, 1992, the District Court denied the motion to reinstate, holding that Section 27A(b) is unconstitutional. The District

Court entered a final order and judgment on July 17, 1992 denying Respondent's motion to reinstate.

The District Court found that Section 27A(b) "violates established separation of powers principles." 806 F. Supp. at 112; App. at B-6. The District Court stated that this Court's rulings on the inviolability of final judgments are controlling because even "[a] small encroachment on the judicial function threatens to unravel the constitutional design, even if in an incremental fashion." 806 F. Supp. at 113; App. at B-10.

The District Court further held that Section 27A(b) undermines "the finality of the judgment entered in this case, and the constitutionally protected rights which had vested in Defendants as a result of such judgment." 806 F. Supp. at 112; App. at B-7. The District Court premised its decision on this Court's rulings in such cases as *Hodges* v. *Snyder*, 261 U.S. 600, 603 (1923), and *McCullough* v. *Virginia*, 172 U.S. 102 (1898), that: "It is not within the power of a legislature to take away rights which have once vested by judgment [because] when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases." 806 F.Supp. at 112; App. at B-8 to 9 (citing *McCullough*, 172 U.S. at 123-24).

On July 20, 1993, the Fifth Circuit issued its opinion reversing the District Court's order and finding Section 27A(b) constitutional. The Fifth Circuit expressly recognized that it was "proceed[ing] without the benefit of prior appellate attention to § 27A(b)." 997 F.2d at 43; App. at A-8. The Court of Appeals also acknowledged that it was required to turn for guidance to the decisions of this Court. But while the consistent holdings of this Court teach that legislation may not reopen a final, nonappealable judgment entered by an Article III court in an action between private parties, the Fifth Circuit nevertheless found that Section 27A(b) did not violate either the due process clause or the separation of powers doctrine.

The Fifth Circuit recognized that "the Fifth Amendment's Due Process Clause is the source of constitutional protection for judgments," 997 F.2d at 47; App. at A-16, and that "§ 27A(b) effectively nullifies these judgments." 997 F.2d at 46; App. at A-14. The Fifth Circuit went on to find, however, that "despite *McCullough* [*v. Virginia*], judgments that are final and nonappealable do not create rights that are absolutely immune from congressional manipulation." 997 F.2d at 49; App. at A-21. Instead, relying on decisions that concededly did *not* involve the application of a "retroactive statute to upset a final, nonappealable judgment," the Fifth Circuit found that retroactive legislation like Section 27A(b) can constitutionally nullify final judgments. 997 F.2d at 50; App. at A-20.

Further, the Fifth Circuit suggested that a private party's rights in a final judgment may be nullified simply by a showing that the legislature acted rationally toward the party asserting a due process violation. 997 F.2d at 50; App. at A-24. The Fifth Circuit further opined that retroactive legislation eviscerating final judgments of private parties should be entitled to no greater protection or "heightened scrutiny" under the due process clause than retroactive legislation affecting individuals' rights to money generally. 997 F.2d at 51 n.14; App. at A-26 n.14. The Fifth Circuit's determination that a private party's vested interest in a final, nonappealable judgment at law may be divested by retroactive legislation so long as a rational basis may be discerned conflicts with fundamental constitutional principles and established precedent of this Court.

On the issue of whether Section 27A(b) violates the separation of powers doctrine, the Fifth Circuit explicitly recognized that legislation reversing the results in particular controversies between private individuals would be "violative of our authority to decide cases." 997 F.2d at 54; App. at A-32 (citing *United States* v. *O' Grady*, 89 U.S. (22 Wall.) 641, 648 (1875)). The Fifth Circuit inexplicably concluded, however, that § 27A(b) was "harmless" under separation of

powers analysis because "[b]y upsetting final judgments, § 27A(b) at most denies us some authority to say when a controversy is over. There is no constitutional impediment to this denial if we share authority with Congress to say when a controversy is done." 997 F.2d at 54; App. at A-32.

The Fifth Circuit's holding that retroactive legislation may upset a final judgment of an Article III court in an action between private parties is without precedent and raises serious implications under the separation of powers doctrine and due process clause of the Constitution.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE CONFLICT IN THE FEDERAL COURTS, AND BETWEEN THE FIFTH AND SIXTH CIRCUITS, ON THE CONSTITUTIONALITY OF SECTION 27A(b)

The Fifth Circuit's decision is directly contrary to that rendered on August 3, 1993, by the Sixth Circuit finding Section 27A(b) to be unconstitutional. *Plaut* v. *Spendthrift Farms*, 1 F.3d 1487 (6th Cir. 1993).[1]

In a scholarly opinion, the *Plaut* court traced the history of the separation of powers doctrine. The Sixth Circuit also reviewed the decisions of this Court on the separation of powers doctrine, commencing with *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), and concluded that:

> the Supreme Court has from the beginning maintained the rule that Congress may not retroactively disturb final judgments of the Federal courts, and . . . adhere[d] to that rule as a protection of the separation of powers. We search in vain for an instance where the courts have permitted Congress retroactively to disturb final judgments rendered in cases between private litigants.

Plaut, 1 F.3d at 1493 (footnote omitted).

The Sixth Circuit held that § 27A(b) contravened the rule of *Hayburn's Case* that proscribes legislative interference with the judgments of the courts under separation of powers principles. The Sixth Circuit stated that:

---

1. Plaintiffs and the United States filed petitions for rehearing *en banc* and, pursuant to the direction of the Sixth Circuit, defendants-appellees filed a response on September 21, 1993. As of this date, the Sixth Circuit has not ruled on the petitions for rehearing *en banc*.

> If the statute which gave rise to *Hayburn's Case* violated the Constitution, then § 27A(b) cannot stand, *a fortiori*. . . . Since we cannot say that the fundamental natures of the legislative and judicial powers have somehow changed since 1792, we cannot square § 27A(b) with *Hayburn's Case*. The dangers to judicial independence in a system of separate powers remain; we are no more willing to ratify a legislative usurpation of the judicial power today than the Court was in 1792.

Id. at 1493 (footnote omitted).

The Sixth Circuit further stated that: "we believe the rule [of *Hayburn's Case*] to be not only alive but vital to the continuing integrity of the independent Federal judiciary . . .." *Id.* at 1494. Implicitly rejecting the Fifth Circuit's view that the legislature's intrusion on the courts' exercise of the judicial power under Section 27A(b) was "harmless," the Sixth Circuit noted that: "Applying the general principles of existing law to specific circumstances, and enforcing the rights between parties created thereby constitute the essence of the judicial power." *Id.* at 1496. The Sixth Circuit referred to the "enormous consequences which would result to our system of government were the Congress's undisputed power to change the existing laws extended to allow it retroactively to change the prior *application* of those laws by the courts . . .." *Id.* at 1496.

Further, the Sixth Circuit rejected the Fifth Circuit's view that this Court had abandoned its holding in *McCullough* v. *Virginia*, that "[i]t is not within the power of a legislature to take away rights which have been once vested by judgment." *McCullough*, 172 U.S. 123-24. The Sixth Circuit stated that:

> we confess ignorance of the rule implied in the Government's argument that a single, unreversed decision of the Supreme Court is not binding on the District Court, or on us . . . [W]e note that *McCullough* remains good law, . . . even if the Supreme Court has not ruled on a similar case since.

Plaut, 1 F.3d at 1493 n.12 (citations omitted).

The Fifth Circuit's opinion also conflicts with the discussion of the constitutionality *vel non* of Section 27A(b) in the Second Circuit's recent opinion in *Axel Johnson Inc.* v. *Arthur Andersen & Co.*, 1993 U.S. App. LEXIS 24954 (1993). The Second Circuit found defendant had no final judgment, and thus the court did not need to reach the issue of the constitutionality of Section 27A(b) in the context of final judgments. Nevertheless, the Second Circuit implicitly rejected the Fifth Circuit's dismissal of *McCullough* as outdated law, and echoed the Sixth Circuit's view that:

> Although *McCullough* is one of the few Supreme Court decisions finding a constitutional bar to the legislative nullification of a judgment, several subsequent decisions have restated the principle set forth in that case.

Axel Johnson, 1993 U.S. App. LEXIS at *15.

Similarly, in *Cooperativa De Ahorro y Credito Aquada* v. *Kidder, Peabody & Co.*, 993 F.2d 269, 273 n.11 (1st Cir. 1993), the court rejected defendants' constitutional attack on Section 27A(b) because no final judgment had been entered. The First Circuit went on to recognize that a party obtains a property right in a cause of action when " 'a final, unreviewable judgment has been obtained.' " *Id.* (citing *Hammond* v. *United States*, 786 F.2d 8, 12 (1st Cir. 1986)).[2]

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2. Several circuit courts have upheld the constitutionality of Section 27A(a) as applied to cases in which there was no final, nonappealable judgment at the time Section 27A was enacted. *See Axel Johnson*, 1993 U.S. App. LEXIS 24954, at *7 (2d Cir. 1993) (collecting circuit decisions). Many of those same courts, however, expressly refused to decide the constitutionality of the application of 27A(b) to reinstate cases involving such final, nonappealable judgments. *See Gray* v. *First Winthrop Corp.*, 989 F.2d 1564, 1571 (9th Cir. 1993) (expressing "no opinion" on constitutionality of overturning final judgments); *Berning* v. *A.G. Edwards & Sons, Inc.*, 990 F.2d 272, 277 (7th Cir. 1993). The Tenth Circuit has expressly refused to apply its decision in *Anixter* v. *Home Stake Prod. Co.*, 977 F.2d 1533 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1841

This Court should grant the Petition and resolve the significant issues raised by the Fifth Circuit's decision, including the conflict in the federal courts[3] as to the constitutionality of Section 27A(b), and the continuing vitality of the Court's decisions in *Hayburn's Case*, *McCullough* v. *Virginia*, and their progeny. Only this Court can resolve the square conflict between the Fifth Circuit's decision in this case and the Sixth Circuit's decision in *Plaut* and provide guidance to the federal courts on whether the legislature can reopen final, unappealable judgments in actions between private parties, as required by Section 27A(b), in the face of the separation of powers and due process provisions of the Constitution.

(1993), involving the application of Section 27A(a) to a pending case, to a case in which a final judgment has been entered. *See Johnston* v. *Cigna Corp.*, Order No. 92-1180 (10th Cir. Nov. 25, 1992), in which the Tenth Circuit refused to summarily reverse the district court's finding that § 27A(b) cannot be constitutionally applied to final judgments.

3. The majority of district courts that have considered the constitutionality of Section 27A(b) have found it to be unconstitutional. *See Armijo* v. *E.F. Hutton & Co.*, No. Civ. 90-1064 JC, slip op. (D.N.M. Aug. 17, 1992) (holding § 27A(b) unconstitutional); *Dulude* v. *CIGNA Sec. Corp.*, 1992 WL 281411, at *2 (E.D. Mich. May 15, 1992) (same); *Treiber* v. *Katz*, 796 F. Supp. 1054, 1059 (E.D. Mich. 1992) (same); *Johnston* v. *Cigna Corp.*, 789 F. Supp. 1098, 1100 (D. Colo. 1992) (same), *appeal pending*, No. 92-1186 (10th Cir.) (argued Sept. 27, 1993); *see also Atlantis Group, Inc.* v. *Rospatch Corp.*, 802 F. Supp. 110, 114 (W.D. Mich. 1992) (*dictum*); *but see Brown* v. *The Hutton Group*, 795 F. Supp. 1307 (S.D.N.Y. 1992) (holding § 27A(b) constitutional citing district court opinion in *Axel Johnson* and decided before the Second Circuit's recent opinion in *Axel Johnson*; also called into question with respect to the constitutionality of overturning final judgments by *Rabin* v. *Fivzar Assoc.*, 801 F. Supp. 1045, 1056 n.11 (S.D.N.Y. 1992)); *Casserly* v. *Shearson Lehman Hutton, Inc.*, Civ. No. 4-90-125, slip op. (D. Minn. July 2, 1992).

II. THE FIFTH CIRCUIT HAS DECIDED IMPORTANT QUESTIONS OF DUE PROCESS AND SEPARATION OF POWERS IN A WAY THAT CONFLICTS WITH THE DECISIONS OF THIS COURT

A. The Fifth Circuit's Opinion Conflicts With *Hayburn's Case* And The Separation of Powers Doctrine

The principle that the legislature may not modify or reverse the final judgment of a federal court has been settled constitutional law for more than 200 years. It derives from our system of federal government, which employs a separation of powers among the three branches of government as a safeguard against tyranny by any one branch. Thus, the Constitution expressly provides that "the judicial Power of the United States shall be vested" in the courts, Art. III, § 1, and not in the legislature "in whom no judicial power of any kind appears to be vested . . .." *Hayburn's Case*, 2 U.S. at 410 n.2. Accordingly, "Congress may not retrospectively vacate decided cases, regardless of how compelling the perceived injustice visited upon the parties by a valid exercise of the judicial power." *Plaut*, 1 F.3d at 1499. Until the Fifth Circuit's decision below, that fundamental principle had been consistently recognized and adhered to by the federal courts. *Id.* at 1496. *See also United States* v. *O'Grady*, 89 U.S. 641, 648 ("it is quite clear that Congress cannot subject the judgments of the Supreme Court to the re-examination and revision . . . of any other department of the government").[4]

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4. *Chicago and Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 113 (1948) (judgments "may not lawfully be revised or overturned or refused faith and credit by another Department."); *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370, 381 n.25 (1940) (suggesting that legislation "affecting judicial judgments rather than administrative orders" could be an "excursion of the Congress into the judicial function"); *Benoni* v. *Boston and Maine Corp.*, 828 F.2d 52, 57 (1st Cir. 1987) (following *Hayburn's Case*); *Humana Hosp. Corp., Inc,. v. Blankenbaker*, 734 F.2d 328, 332-33 (7th Cir. 1984) ("The Supreme Court con-

The rule in *Hayburn's Case* has ever since "been regarded as a constitutional law," *Gordon* v. *United States*, 117 U.S. 697, 703 (Appendix 1885), and "reflect[s] a proper understanding of the role of the Judiciary." *Morrison* v. *Olson*, 487 U.S. 654, 677 n.15 (1988). As the Court reiterated nearly 200 years later:

> It is unquestionable that the Constitution has invested Congress with no judicial powers; it cannot be doubted that a legislative direction to a court to find a judgment in a certain way would be little less than a judgment rendered directly by Congress.

United States v. *Sioux Nation of Indians*, 448 U.S. 371, 398 (1979) (quoting *Nock* v. *United States*, 2 Ct. Cl. 451, 457-58 (1867)). The evisceration of the final judgment of an Article III court by the legislature is unconstitutional because it makes "substantial inroads into functions that have traditionally been performed by the judiciary." *Northern Pipeline*

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sistently has held from its earliest day, that no decision of a federal court may be reviewed by the legislative branch"); *Daylo* v. *Administrator of Veterans' Affairs*, 501 F.2d 811, 816 (D.C. Cir. 1974) ("superior legislative review" of judicial decisions is forbidden); *see also Georgia Ass'n of Retarded Citizens* v. *McDaniel*, 855 F.2d 805, 810 (11th Cir. 1988) (same), *cert. denied*, 490 U.S. 1090 (1989); *Tonya K. ex rel. Diane K.* v. *Board of Educ.*, 847 F.2d 1243, 1247 (7th Cir. 1988) (once "a court has disposed of a case, Congress may not dictate a different decision"); *Electronic Data Sys. Corp. Iran* v. *Social Sec. Org. of the Government of Iran*, 508 F. Supp. 1350, 1363 (N.D. Tex. 1981) ("neither Congress, the Executive, an Executive Agency nor a State Legislature may by subsequent acts negate, disregard or nullify the judgment of the Court already rendered"); *Cerro Metal Prods.* v. *Marshall*, 467 F. Supp. 869, 877-78 (E.D. Pa. 1979) (separation of powers bars an act of Congress which pronounces that "what had theretofore been judicially declared as law 'shall be deemed never to have had effect.' "), *aff'd*, 620 F.2d 964 (3d Cir. 1980). In its separation of powers analysis, the Fifth Circuit does not mention, let alone distinguish, any of these cases.

Constr. Co. v. *Marathon Pipeline Co.*, 458 U.S. 50, 84 (1982) (plurality opinion).

The Fifth Circuit's view that § 27A(b)'s intrusion on the judicial power was "harmless" because it "at most denies us some authority to say when a controversy is over," 997 F.2d at 54, App. at A-32, reflects a misunderstanding of the role of the separation of powers doctrine in our form of government and the essence of the judicial power. The proper analysis of § 27A(b), in the context of the separation of powers doctrine, demonstrates that § 27A(b) constitutes not a "harmless" but instead a very substantial legislative intrusion upon the courts' exercise of the "judicial Power." As the *Plaut* court correctly found:

> [T]he case at bar clearly represents the irreducible minimum of the separation required to preserve the system's last vestiges of federalism. For if Congress may by legislation reverse or vacate the final judgments of the Federal Courts, then Congress has rendered the whole function of the judiciary futile: whether "the whole power of one department is exercised by the same hands which possess the whole power of another department," *Mistretta*, 488 U.S. at 381 (quoting The Federalist No. 47 (Madison)) is left subject only to the self-restraint of the legislature. As Jefferson wrote,
>
> > Nor should our assembly be deluded by the integrity of their own purposes, and conclude that these unlimited powers will never be abused, because themselves are not disposed to abuse them .... The time to guard against corruption and tyranny, is before they shall have gotten hold on us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered.
>
> Thomas Jefferson, *Notes on the State of Virginia*, Query 13, 121 (1784) (reprinted in Ralph Lerner and Philip B. Kurland, eds., 1 The Founders' Constitution 320 (1987)). Were the validity of the judgments of the judicial branch to depend on the approval of the legislative branch, how

> much more fully could the legislature increase its own powers at the expense of the judiciary, or usurp or undermine the powers belonging to the judicial branch? What part of the camel would then remain outside the tent?

Plaut, 1 F.3d at 1499.

In sum, this Court should intervene to determine this most fundamental and significant issue of constitutional law — whether by enactment of § 27A(b) Congress has intruded upon the "judicial Power" in violation of the Constitution.

B. The Fifth Circuit's Opinion Conflicts With *McCullough* and Its Progeny And the Due Process Clause

The Fifth Circuit concluded that *McCullough* is no longer good law, in large part, because "the Court has never applied this holding in *McCullough* to decide another case." 997 F.2d at 46; App. at A-15. This contention simply disregards subsequent decisions of this Court[5] and the lower federal courts[6]

5. *See Western Union Tel. Co* v. *Louisville & N.R. Co.*, 258 U.S. 13, 22 (1922) (rights can be withdrawn only before a "final and unreviewable determination"); *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U.S. 338, 340 (1922). *See also Stephens* v. *Cherokee Nation*, 174 U.S. 445, 478 (1899) ("it is undoubtedly true that legislatures cannot set aside the judgments of courts").

6. Numerous lower courts have followed the rule of *McCullough*. *See Central States Southeast & Southwest Areas Pension Fund*, 960 F.2d 1339, 1345 (7th Cir.), *cert. denied*, 113 S. Ct. 179 (1992); *Georgia Ass'n of Retarded Citizens* v. *McDaniel*, 855 F.2d 805, 810 (11th Cir.), *cert. denied*, 490 U.S. 1090 (1989); *Daylo* v. *Administrator of Veterans Affairs*, 501 F.2d 811, 816 (D.C. Cir. 1974); *De Rodulfa* v. *United States*, 461 F.2d 1240, 1253 n.62 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 949 (1972); *Adams* v. *Fidelity & Cas. Co. of N.Y.*, 147 F.R.D. 265, 268 (S.D. Fla. 1992); *Johnston* v. *Cigna Corp.*, 789 F. Supp. 1098, 1100 (D. Colo. 1992); *I.A.M. Nat'l Pension Fund* v. *Wakefield Indus., Inc.*, 612 F. Supp. 643, 646 (D.D.C. 1985); *United States* v. *Board of Educ. of the City of Chicago*, 588 F. Supp. 132, 235 (N.D. Ill. 1984), *vacated on other grounds*, 744 F.2d 1300 (7th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985); *Electronic Data Sys. Corp. Iran* v. *Social Sec. Org. of the Gov. of Iran*, 508 F. Supp. 1350, 1363 (N.D. Tex. 1981).

that have continued to adhere to *McCullough* and the principles articulated in *McCullough*. *See, e.g., Bradley* v. *School Board of City of Richmond*, 416 U.S. 696, 720 (1974) ("The Court has refused to apply an intervening change . . . where it has concluded that to do so would infringe upon or deprive a person of a right that has matured or become unconditional.") (citations omitted.).[7]

Further, the Fifth Circuit's dismissal of *McCullough* violates the principle of *stare decisis*. As the Sixth Circuit noted in *Plaut*, "we confess ignorance of the rule implied in the Government's argument that a single, unreversed decision of the Supreme Court is not binding on the District Court or on us. . . . *McCullough* remains good law . . . even if the Supreme Court has not ruled on a similar case since." *Plaut*, 1 F.3d at 1493 n.12 (6th Cir. 1993). The Second Circuit, in *Axel Johnson*, reached the same conclusion. 1993 U.S. App. LEXIS 24954, at *15.

7. This Court and the lower courts also have adhered to the *McCullough* principle, without specifically citing the decision. *See Hurtado* v. *California*, 110 U.S. 516, 536 (1884) ("due process of law" excludes from legislative power, *inter alia*, "acts reversing judgments, . . . legislative judgments and decrees"); *Pennsylvania* v. *Wheeling & Belmont Bridge*, 59 U.S. (18 How.) 421, 431 (1855) (Congress cannot "annul the judgment of the court already rendered or the rights determined thereby"); *Massingill* v. *Downs*, 48 U.S. (7 How.) 760, 768 (1849) ("no legislative act can change the rights and liabilities of parties which have been established by solemn judgment."); *see also American Federation of Gov't Employees* v. *Reagan*, 870 F.2d 723, 726 n.20 (D.C. Cir. 1989) ("[c]urative government action is not to be given such retroactivity as to demolish intervening vested rights."); *Tonya K. ex rel. Diane K.* v. *Board of Education*, 847 F.2d 1243, 1247-48 (7th Cir. 1988) ("once a court has disposed of a case, Congress may not dictate a different result"); *Taxpayers for Animas La Plata Referendum* v. *Animas-La Plata Water Conservancy Dist.*, 739 F.2d 1472, 1477 (10th Cir. 1984) (legislature may not interfere with an adjudicated right).

Instead of addressing this precedent, the Fifth Circuit relied upon the decisions in *Fleming* v. *Rhodes*, 331 U.S. 100, 107 (1947), and *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), which do *not* involve legislative attempts to overturn final judgments in private actions seeking damages.[8] *Fleming*, *Usery*, and the other cases cited by the Fifth Circuit do not even mention, much less overrule, *McCullough* and its progeny. Indeed, no court, other than the Fifth Circuit, has ever applied *Fleming*[9] or *Usery*[10] to a

8. The other decisions cited by the Fifth Circuit, *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 431 (1855), and *Chase Sec. Corp.* v. *Donaldson*, 325 U.S. 304 (1945), are inapposite for the same reason. To the contrary, *Pennsylvania* and *Chase* reaffirm the rule that private rights that have passed into judgment are immune from retroactive legislation. *See Axel Johnson*, 1993 U.S. App. LEXIS 24954, at *15; *Plaut*, 1 F.3d at 1494-96. *Freeland* v. *Williams*, 131 U.S. 405, 417, 419-21 (1889), involved a statute enacted "after the turmoils of a civil war" which overturned a state court judgment "rendered on account of acts done in pursuance of the powers of a belligerent in time of war."

9. The Fifth Circuit's interpretation of *Fleming* is inconsistent with this Court's opinion in *Federal Housing Admin.* v. *Darlington Mills*, 358 U.S. 84, 90 (1958) (*Fleming* affects "future action") and the Second Circuit's decision in *Battaglia* v. *General Motors Corp.*, 169 F.2d 254, 259 (2d Cir.) (*Fleming* applies to claims that "had not ripened into final judgment"), *cert. denied*, 335 U.S. 887 (1948). *See also Darlington Mills*, 358 U.S. at 93 (Frankfurter, J., dissenting) (*Fleming* did not involve "the complete wiping out of ... vested rights"); *Treiber* v. *Katz*, 796 F. Supp. 1054, 1061 n.6 (E.D. Mich. 1992); C. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 719 n.146 (1960) (the statute in *Fleming* was "construed as preventing only future evictions ...[not as] depriving a person of a previously acquired judgment.").

10. The Fifth Circuit's reliance on *Usery* is inconsistent with the decisions of several circuits, all of which have applied retroactive statutory changes only in *pending* cases on the strength of *Usery*, or the principle stated therein, but have consistently recognized that retroactive legislation cannot undermine "definite or enforceable property rights ... reduced to final judgment." *See Salmon* v. *Schwarz*, 948 F.2d 1131, 1143 (10th Cir. 1991); *In re TMI Litig. Cases Consolidated II*, 940 F.2d 832, 861 (3d Cir. 1990) (citing *Usery*, but stating that a claim affords no property right "until reduced to final judgment"); *Lunsford* v. *Price*, 885 F.2d 236, 240 n.13 (5th Cir. 1989); *Grimesy* v. *Huff*, 876 F.2d 738, 743-44 (9th Cir. 1989) (rights do not vest until " 'a final unreviewable judgment' "), *cert. denied*, 111 S. Ct. 1620 (1991); *Canisius College* v. *United States*, 799 F.2d 18, 26 (2d Cir. 1986) (citing *Usery*, but stating that right not protected because plaintiff "has no final judgment establishing such a right"), *cert. denied*, 481 U.S. 1014 (1987); *Battaglia* v. *General Motors Corp.*, 169 F.2d 254, 259 (2d Cir.) (Congress can act so long as claims have "not ripened into final judgment."), *cert. denied*, 335 U.S. 887 (1948); *National Railroad Passenger Corp.* v. *State of Nev. Dept. of Conservation and Natural Resources*, 776 F. Supp. 528, 532 (D. Nev. 1991); *Michael Reese Hosp. and Medical Center* v. *United States*, 684 F. Supp. 986, 991 (N.D. Ill. 1988).

case involving a final judgment of an Article III court.

The Fifth Circuit's reliance on Fed. R. Civ. P. 60(b)(6) to justify a legislative attempt to re-open a final judgment also raises important issues worthy of review by this Court. The Sixth Circuit dismissed the same argument, in the context of separation of powers principles, as "irresponsible," explaining that the "Court's authority [in Rule 60(b)] to set aside its own final judgment ... is profoundly different from a legislative decree requiring courts to set aside final judgments." *Plaut*, 1 F.3d at 1494 n.13. A contrary holding would mean that there are no "final" judgments and thus "there are no 'rights' of any kind and every decision ... is forever malleable. We doubt that the Supreme Court would take this view unless it is willing to overrule *Hodges*, *O'Grady*, and *Wheeling & Belmont Bridge* and jettison the [vested rights] doctrine." *Tonya K. ex rel. Diane K.* v. *Board of Education*, 847 F.2d 1243, 1248 (7th Cir. 1988).

Finally, the Fifth Circuit's suggestion that vested property rights may be divested if the legislature has "acted rationally toward the party asserting a due process violation," 997 F.2d at 50; App. at A-24, clearly misreads the decisions of this Court. Insofar as vested rights are concerned, a rational relationship standard is simply inapplicable. *See Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring) (the Constitution "prohibits (or

requires compensation for) all retroactive laws that destroy vested rights''); *Bradley*, 416 U.S. at 720 (''intervening change[s]'' may not infringe upon ''matured'' or ''unconditional'' rights). Moreover, the decisions cited by the Fifth Circuit for this novel proposition involved legislative programs that altered unvested economic rights or obligations and that did not attempt to overturn final judgments involving private litigants. *See United States* v. *Sperry Corp.*, 110 S. Ct. 387, 396 (1989); *Usery*, 428 U.S. at 18; *Wright* v. *Union Central Life Ins. Co.*, 304 U.S. 502, 516 (1938).

This Court should grant the Petition to consider the important constitutional due process issues raised by the Fifth Circuit's opinion, including the continued vitality of the Court's decision in *McCullough* v. *Virginia*, and the rule that private rights that have passed into final judgment are immune from retroactive legislation.

CONCLUSION

A writ should be issued to address the fundamental separation of powers and due process questions posed by this case.

Dated: New York, New York
October 18, 1993

Respectfully submitted,

SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004
(212) 558-4000

CARRINGTON, COLEMAN
SLOMAN & BLUMENTHAL, L.L.P.
200 Crescent Court, Ste. 1500
Dallas, Texas 75201
(214) 855-3000

Attorneys for Petitioner
Goldman, Sachs & Co.

ERNST & YOUNG
380 Madison Avenue
New York, New York 10017
(212) 773-3800

WEIL, GOTSHAL & MANGES
700 Louisiana, Suite 1600
Houston, Texas 77002
(713) 546-5000

Attorneys for Petitioner
Ernst & Young

* *Counsel of Record*

JAMES W.B. BENKARD*
Hannah Berkowitz
Vincent T. Chang
Davis Polk & Wardwell
450 Lexington Avenue
New York, New York 10017
(212) 450-4000

HUTCHESON & GRUNDY, L.L.P.
901 Main Street, Suite 6200
Dallas, Texas 75202
(214) 761-2800

Attorneys for Petitioner
Morgan Stanley & Co. Incorporated

WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171-0149
(212) 371-9200

FIGARI & DAVENPORT, L.L.P.
901 Main Street, Suite 4800
Dallas, Texas 75202
(214) 939-2000

Attorneys for Petitioner
Salomon Brothers Inc

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3375

TGX CORP.

Plaintiff,

versus

GLORIA ANNETTE TURNER SIMMONS, ET AL.,

Defendants-Appellants
Cross-Appellees,

versus

GREENWICH INSURANCE COMPANY, ET AL.,

Defendants-Appellants
Cross-Appellees,

* * * * *

GAYLON D. SIMMONS, ET AL.,

Defendants-Appellants
Cross-Appellees,

versus

J.C. TEMPLETON, ET AL.,

Defendants-Appellees
Cross-Appellants.

Appeals from the United States District Court for the
Eastern District of Louisiana

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* * * * *

No. 92-1662

PACIFIC MUTUAL LIFE INSURANCE CO.

Plaintiff-Appellant,

versus

FIRST REPUBLICBANK CORP., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

BEFORE: POLITZ, *Chief Judge*, REAVLEY and BARKSDALE, *Circuit Judges*.

REAVLEY, *Circuit Judge*:

Plaintiffs who suffered dismissals in two separate securities-fraud cases asked the district courts to reinstate their claims under § 27A(b) of the Securities Exchange Act, 15 U.S.C. § 78aa-1(b), which Congress enacted in November 1991. The district courts denied these motions after holding that § 27A(b) violates the Constitution by disturbing final judgments and invading judicial authority. We conclude that the legislation is constitutional and we reinstate the plaintiffs' suits.

I. BACKGROUND

A. PACIFIC MUTUAL LIFE INS. CO. v. FIRST REPUBLICBANK CORP., ET AL.

In March 1991, Pacific Mutual Life Insurance Company (PMLI) sued investment bankers and accountants (collectively PMLI Defendants)[1] for securities fraud under § 10(b) of the 1934 Securities Exchange Act (1934 Act), 15 U.S.C. § 78j(b). PMLI's claims arise from the June 1987 merger of InterFirst Corporation and RepublicBank Corporation, PMLI's purchase of InterFirst securities in July and September 1987 for approximately $8 million, and the PMLI Defendants' facilitation of those transactions.

From long before PMLI purchased the securities to the time after PMLI filed its suit, this court determined the statute of limitations for implied private actions under § 10(b) according to analogous state law. When PMLI filed its suit in the United States District Court for the Northern District of Texas, our precedent recognized that the four-year limitations period applicable to fraud actions in Texas also governs § 10(b) actions filed there. *In re Sioux, Ltd., Sec. Litig.* v. *Coopers & Lybrand*, 914 F.2d 61, 64 (5th Cir. 1990). For that reason, although the PMLI Defendants filed dispositive motions under FED. R. CIV. P. 9(b) and 12(b)(6), they did not contest the timeliness of PMLI's suit.

While these motions awaited the district court's consideration, the Supreme Court issued *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991). *Lampf*

1. The PMLI Defendants are Morgan Stanley & Co., Goldman Sachs & Co., Ernst & Young & Co., and Salomon Brothers Inc.

implicitly overrules *Sioux, Ltd.* and many similar cases in other circuits with its holding that the Securities Exchange Act as written in 1934, not state law, establishes the limitations period for § 10(b) suits. *Id.* at 2780. The Court read the Securities Exchange Act of 1934 to establish a uniform rule that "[l]itigation instituted pursuant to § 10(b) . . . must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation." *Id.* at 2782 (1-and-3 rule).

On the same day that the Court rendered *Lampf*, it decided *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991). A plurality of the *Beam* Court held that Georgia's Supreme Court erred by "refus[ing] to apply a rule of federal law retroactively after the case announcing the rule has already done so." *Id.* at 2446. *Beam* teaches that "when th[is] Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." *Id.* at 2448.

Because the *Lampf* Court applied the 1-and-3 rule to eliminate Gilbertson's § 10(b) claim, *Beam* required courts to apply the limitation rule announced in *Lampf* to pending claims under § 10(b). The PMLI Defendants promptly brought *Lampf* and *Beam* to the district court's attention, and the court dismissed PMLI's § 10(b) claims with prejudice in August 1991. The district court based its dismissal on the fact that "the face of [PMLI's complaint establishes] that this action was filed more than three years after the alleged misrepresentations or omissions upon which [PMLI's] claim rests." Recognizing no way around *Lampf* and *Beam*, PMLI did not appeal.

Three months later, however, Congress provided a way around *Lampf* and *Beam* by passing § 27A, which provides:

> *(a) Effect on Pending Causes of Action.*— The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> *(b) Effect on Dismissed Causes of Action.*— Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991—
>
> > (1) which was dismissed as time barred subsequent to June 19, 1991, and
> >
> > (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after [December 19, 1991].

1934 Act, § 27A (amended by P.L. 102-242 (December 19, 1991)), *codified at* 15 U.S.C. § 78aa-1. On January 31, 1992, PMLI filed a motion to reinstate pursuant to § 27A(b). The PMLI Defendants challenged the constitutionality of § 27A(b), and the district court admitted the United States as an intervenor to explain why § 27A is constitutional. After considering the parties' written submissions, the district court held: 1) § 27A(b) contravenes due process by divesting the PMLI Defendants of their final judgment; and 2) § 27A contravenes the constitutionally-mandated retroactivity of new legal rules recognized in *Beam*. PMLI appeals from the district court's denial of its motion to reinstate.

B. SIMMONS, ET AL. v. TGX CORP., ET AL.

In 1987, TGX Corporation sued Gaylon Simmons[2] over a $21 million stock purchase contract which the parties executed in November 1986, and Simmons filed a counterclaim against TGX under § 10(b). TGX filed for bankruptcy protection in 1990, staying the counterclaim. Simmons then filed a separate § 10(b) suit in March 1990 against attorneys, accountants, and directors (collectively TGX Defendants)[3] who facilitated the stock purchase.

Simmons sued the TGX Defendants in the United States District Court for the Eastern District of Louisiana.[4] The parties disputed whether Simmons met Louisiana's two-year prescriptive period for securities fraud, which this court has held applicable to § 10(b) claims. *Jensen* v. *Stellings*, 841 F.2d 600, 606 (5th Cir. 1988). The Supreme Court rendered *Lampf* and *Beam* before the district court ruled on the parties' limitation dispute.

The TGX Defendants informed the district court that Simmons sued them in March 1990, and his complaint alleges November 1986 misdeeds. They argued that these facts entitled them to dismissal under *Lampf's* 1-and-3 rule. Simmons did not dispute the effect of *Lampf*, and the district court

2. Gloria Simmons joins Gaylon Simmons as a party to this dispute.

3. The TGX Defendants are J.C. Templeton, Joe H. Foy, Harry V. Carlson, Robert Ted Enloe, III, W.A. Griffin, Thomas L. Kister, Leonard Leon, Edward T. Cotham, Bracewell & Patterson, BDO Seidman, Greenwich Insurance Co., and William M. Templeton. Simmons amended his complaint to add Greenwich and W.M. Templeton as defendants in May 1991.

4. The court consolidated this suit with the suit between TGX Corporation and Simmons.

directed the TGX Defendants to draft a judgment and order. That document recited:

> all of the federal claims asserted are time-barred, and the Defendants are entitled to judgment on those claims as a matter of law; and [the court finds that] final judgment should be entered . . .
>
> [P]laintiffs' claims . . . under . . . the Securities Exchange Act of 1934 are hereby dismissed with prejudice.

Simmons asked the district court to delete "with prejudice" from the judgment to avoid any preclusive effect, and the court obliged before signing it in August 1991. Simmons did not appeal this judgment.

Simmons sought the deletion from the August 1991 judgment because he thought that he could avoid *Lampf* by adding the TGX Defendants as parties to the 1987 counterclaim against TGX, and he did not want the dismissal in the March 1990 suit to preclude him from doing so. Simmons's idea ultimately proved unsuccessful,[5] and the district court entered another judgment dismissing Simmons's § 10(b) claims against the TGX Defendants in October 1991. Simmons did not appeal this October 1991 judgment.

5. A magistrate permitted Simmons to amend his 1987 counterclaim for purposes of procedure only, but the district court held that the additional claims did not relate back to the 1987 claims, so those claims were still untimely. In its September 1991 minute entry explaining why Simmons's § 10(b) claims were still untimely, the district court stated that the August 1991 judgment did not preclude the amendment to the 1987 counterclaim because the court entered the August 1991 judgment without prejudice.

With renewed hope from § 27A(b), Simmons filed a Motion to Reinstate the March 1990 suit in January 1992. The parties disputed both the applicability and constitutionality of § 27A(b). In March 1992, the district court held: 1) the court dismissed Simmons's March 1990 § 10(b) suit "as time barred" within the meaning of § 27A(b) despite the fact that the court dismissed the suit without prejudice in August 1991; and 2) Simmons timely filed his § 10(b) claims under Louisiana's two-year prescription period and *Jensen*; but 3) § 27A contravenes the constitutionally-mandated retroactivity of new legal rules recognized in *Beam*. *TGX Corp.* v. *Simmons*, 786 F. Supp. 587 (E.D. La 1992).

In April 1992, Simmons asked for a new trial on his reinstatement motion. In May 1992, the district court denied Simmons's motion for a new trial after holding that, in addition to *Beam's* implications, § 27A(b) violates due process principles by upsetting final judgments. Simmons appeals from the district court's denials of his motion to reinstate and his new-trial motion. The TGX Defendants cross-appeal the district court's ruling that Simmons's March 1990 suit falls within the scope of § 27A(b) even though the district court dismissed that suit without prejudice in August 1991. The United States intervenes to defend the constitutionality of § 27A(b).

II. ANALYSIS

Simmons and *PMLI* ultimately raise the same novel constitutional questions, so we decide both appeals in this opinion. We review the district courts' decisions concerning the meaning and constitutionality of § 27A(b) *de novo*. *Moulton* v. *City of Beaumont*, 991 F.2d 227, 230 (5th Cir. 1993); *Gray* v. *First Winthrop Corp.*, 989 F.2d 1564, 1567 (9th Cir. 1993). We proceed without the benefit of prior appellate attention to § 27A(b).

A. WHETHER A CONSTITUTIONAL SECTION 27A(b) HELPS SIMMONS

The TGX Defendants argue that § 27A(b) does not afford Simmons any relief even if it is constitutional, because Simmons asked the district court to dismiss his March 1990 claims under § 10(b) without prejudice. But all of their arguments require an inaccurate reading of § 27A(b).

Congress wrote § 27A(b) to prevent courts from applying *Lampf* to cases that plaintiffs filed before the Court rendered *Lampf*. Section 27A(b) states a specific procedure (motion for reinstatement within 60 days of enactment) to restart "[a]ny" § 10(b) claim "commenced on or before June 19, 1991 . . . which was dismissed as time barred" after *Lampf*, but "would have been timely filed" before *Lampf*.

What little legislative history exists for § 27A confirms that Congress intended to obliterate *Lampf* and *Beam* for all cases filed before the Court rendered *Lampf*.[6] *See, e.g.*, 137 CONG. REC. S17382 (daily ed. Nov. 21, 1992) (Sen. Riegle, § 27A sponsor) ("The language of the bill is designed to return plaintiffs and defendants to exactly the position that they had on June 19, 1991," the day before the Court rendered *Lampf*.); *id.* at H11813 (daily ed. Nov. 26, 1991) (Rep. Markey) ("The language . . . unambiguously reverses the *Lampf* ruling's application of the 1-year and 3-year statute of limitations. . ."). The Supreme Court itself has recognized as much. *See Musick, Peeler & Garret* v. *Employers Ins. of Wausau*, 1993 WL 179262 at *5 ("Congress . . . limit[ed] the

6. For a comprehensive treatment of the legislative history of § 27A, see Anthony Michael Sabino, *A Statutory Beacon or a Relighted* Lampf? *The Constitutional Crisis of the New Limitary Period for Federal Securities Law Actions*, 28 TULSA L.J. 23, 27-30 (1992).

retroactive effect of [*Lampf* by directing] the applicable 'limitation period for any private civil action implied under [§ 10(b)] that was commenced on or before June 19, 1991. . .'''); *id.* at *11 (Thomas, J., dissenting) (Congress ''alter[ed] the retroactive effect of the 10b-5 limitations period that we adopted in *Lampf*.''). We know of no evidence or reason that supports a narrower reading of § 27A. *Compare Herman & McLean* v. *Huddleston*, 103 S. Ct. 683, 689 (1983) (interpreting securities laws to ''further[] their broad remedial purposes'').

1. Time-Bar Dismissal

The TGX Defendants seize on the district court's statement that Simmons did not voluntarily dismiss his § 10(b) claims under FED. R. CIV. P. 41 by asking the court to dismiss those claims without prejudice in August 1991. *Simmons*, 786 F. Supp at 590. They argue that the court's statement is erroneous, and once we recognize that Simmons voluntarily dismissed his claims, we must hold that the claims were not ''dismissed as time barred'' under § 27A(b)(1).

But even if Simmons chose to dismiss his § 10(b) claims, the record conclusively establishes that he did so because *Lampf* rendered those claims time barred. The district court's August 1991 judgment states this very fact. We interpret ''dismissed as time barred'' in § 27A(b) to include all cases that were dismissed because of *Lampf's* time bar. Simmons satisfies this but-for scrutiny.

2. Nullification

The TGX Defendants have found language in our cases in which this court states that the effect of a voluntary dismissal is to ''put the plaintiff in the same legal position in which he would have been had he never brought the first suit.'' *Taylor* v. *Bunge Corp.*, 775 F2d 617, 619 (5th Cir. 1985). They

would have us apply this language, irrespective of the reasons for and context in which we used it, to hold that Simmons's suit vanished upon voluntary dismissal, leaving nothing to reinstate by operation of § 27A(b).

But there is no rule that makes all voluntarily dismissed cases absolutely null for all purposes. This court has permitted a district court to resurrect a voluntarily dismissed case under FED. R. CIV. P. 60. *Boehm* v. *Office of Alien Property*, 344 F.2d 194 (5th Cir. 1965). And even if there were an absolute-nullity rule, we could not apply it in the face of contrary congressional intent unless we could articulate a constitutional basis for doing so. As we have explained, Congress intended broad relief from *Lampf* for any § 10(b) claim ''that was commenced on or before June 19, 1991.'' Simmons commenced his § 10(b) claims against the TGX Defendants on March 8, 1990, which places those claims within the ambit of § 27A(b).

3. Avoidance

The TGX Defendants cite cases holding that courts should refrain from deciding constitutional questions if possible. *See, e.g., Daylo* v. *Administrator of Veterans' Affairs*, 501 F.2d 811, 819 (D.C. Cir. 1974) (''[W]hen one interpretation of a statute would create a substantial doubt as to the statute's constitutional validity, the courts will avoid that interpretation absent a 'clear statement' of a contrary legislative intent.''). They accompany these cites with creative readings of § 27A(b) that would avoid constitutional questions, while conveniently killing Simmons's claims.[7] None of their

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7. For example, the TGX Defendants suggest that Congress really accomplished nothing whatsoever in § 27A because the ''laws applicable . . . as such laws existed on June 19, 1991,'' which § 27A directs courts to apply, are defined by the Securities Exchange Act of 1934, just as *Lampf* holds. They also suggest that § 27A only replaces the one-year limitations period

readings respects Congress' unmistakable intent to keep *Lampf* from operating retroactively in cases that were dismissed as time barred.[8] We will not ignore the obvious meaning of § 27A simply to avoid the constitutional questions that Congress has created.

4. Claim Preclusion

Finally, the TGX Defendants point to the district court's October 1991 dismissal of Simmons's amended counterclaim in the TGX suit. They argue that the court dismissed this amended counterclaim with prejudice, and the amended counterclaim raised the same claims that Simmons pursues through his January 1992 reinstatement motion under § 27A(b), so claim preclusion bars any reinstatement of Simmons's March 1990 claims regardless of § 27A(b).

But the TGX Defendants have waived any claim-preclusion argument by failing to raise it in the district court. Our thorough search of the record reveals no mention of claim preclusion by the court's October 1991 judgment, and we refuse to consider it for the first time on appeal. *See Russell* v. *SunAmerica Sec., Inc.*, 962 F.2d 1169, 1172 (5th

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discussed in *Lampf*, and does not affect *Lampf's* direction that § 10(b) actions be further limited by a three-year statute of repose.

The PMLI Defendants suggest that Congress only meant § 27A(b) to reinstate actions that were dismissed from a district court, but still pending on appeal at the time a party files a motion for reinstatement.

8. *Cf. Georgia Ass'n of Retarded Citizens* v. *McDaniel*, 855 F.2d 805, 809 (11th Cir. 1988) (Though Congress intended a statute to control cases "pending" before enactment of the statute, the court found no clear intent that the statute would apply to pending cases that a court had also finally dismissed.).

Cir. 1992) (failure to present res judicata argument to district court usually prevents appellate court from addressing the issue); *see also Aluminum Prod. Distrib., Inc.* v. *Aaacon Auto Transp., Inc.*, 549 F.2d 1381, 1384 (10th Cir. 1977) (where a party asserted res judicata for the first time in a new-trial motion, "the district court was not bound by any [prior] judgment," and the appellate court refused to consider any preclusive effect on appeal).

We come to the central question of both cases: the constitutionality of § 27A(b).

B. WHETHER THE CONSTITUTION PROTECTS INDIVIDUALS OR THE JUDICIARY FROM § 27A(B)

Congress' authority to establish limitations periods for securities-fraud claims cannot be disputed. *See Musick*, 1993 WL 179262 at *4-*5. Section 27A(b) is controversial exclusively for its retroactivity.[9] While the Constitution proscribes retroactive criminal legislation, it contains no analogous civil provision. U.S. CONST. art. I, § 9; *Mahler* v. *Eby*, 44 S. Ct. 283, 286 (1924).

The PMLI Defendants and TGX Defendants (collectively Defendants) argue that the Supreme Court's precedent and the structure of the Constitution establish that § 27A(b) unconstitutionally affects individuals and the federal judiciary. The district courts agreed with them. We do not.

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9. A retroactive statute "gives to preenactment conduct a different legal effect from that which it would have had without the passage of the statute." Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 692 (1960) (hereinafter *Constitutionality of Retroactive Legislation*).

1. Individual Rights

The Constitution's Fifth Amendment prohibits Congress from depriving any person of property without due process of law. The Defendants claim that § 27A(b) contravenes the Fifth Amendment by compromising two of their property rights as recognized by the Supreme Court.

a. The Right to a Final, Nonappealable Judgment

Each of the defendants in these cases (collectively Defendants) possessed final, nonappealable judgments dismissing the plaintiffs' § 10(b) claims. Unlike § 27A(a), § 27A(b) effectively nullifies these judgments, so the cases addressing the constitutionality of § 27A(a) have nothing to say about whether § 27A(b) unconstitutionally abrogates any right to a final judgment.[10] For guidance on this question, we turn to the Supreme Court.

The Defendants rely upon *McCullough* v. *Virginia*, 19 S. Ct. 134 (1898) and its progeny to argue that § 27A(b) cannot constitutionally take away their judgments. McCullough obtained a judgment against Virginia in 1892, but a Virginia appellate court reversed that judgment. *Id.* at 135. Between the time of judgment and its reversal, Virginia's legislature repealed the statute that authorized McCullough's suit. When

10. The only appellate courts to rule on the constitutionality of § 27A to date have upheld it as a means of changing the limitations period in *pending* § 10(b) cases. *Cooke* v. *Manufactured Homes, Inc.*, 1993 WL 248257, at *8 (4th Cir. July 9, 1993); *Cooperativa de Ahorro y Credito Aguada* v. *Kidder, Peabody & Co.*, 1993 WL 156464, at *3 & n.11 (1st Cir. May 19, 1993); *Berning* v. *A.G. Edwards & Sons*, 990 F.2d 272, 279 (7th Cir. 1993); *Gray*, 989 F.2d at 1574; *Anixter* v. *Home-State Prod. Co.*, 977 F.2d 1533, 1547 (10th Cir. 1992); *Henderson* v. *Scientific-Atlanta, Inc.*, 971 F.2d 1567, 1570 (11th Cir. 1992).

the Supreme Court agreed to hear McCullough's appeal, Virginia asked the Court to apply the new law repealing authorization for the suit and dismiss McCullough's appeal. *Id.* at 142. The Court emphatically refused Virginia's request:

> It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.

Id.[11]

Our research indicates that the Court has never applied this holding in *McCullough* to decide another case. Moreover, both before and after *McCullough*, the Court has decided cases with identical relevant facts according to a different rule.[12] Accordingly, we must carefully scrutinize

11. Before *McCullough*, the Court did not adhere to such an absolute rule. *See Freeland* v. *Williams*, 9 S. Ct 763, 767-68 (1889) (sustaining a state law which invalidated a final judgment for damages in a trespass action); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 431 (1855) (accepting "*as a general proposition* . . . especially as it respects adjudication upon the private rights of parties," that legislation "cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff") (emphasis added).

12. In *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801, Chief Justice Marshall explained:

> [I]f, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . [T]he court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

Id. at 110. Almost two hundred years later, *Schooner Peggy* remains good law. *See Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 110 S. Ct. 1570,

McCullough's rationale in assessing the precedential value of its broad statement concerning rights vested by judgment.

The *McCullough* Court did not explicitly ground its holding in the Constitution. In subsequent decisions, however, the Court explained that the Fifth Amendment's Due Process Clause is the source of constitutional protection for judgments, including the one that belonged to McCullough. *E.g.*, *Hodges* v. *Snyder*, 43 S. Ct. 435, 436 (1923). Thus, we decide this case according to the jurisprudence that the Court has developed to describe how due process protects individuals from retroactive legislation. The Defendants stress a "vested rights" theory exemplified by *McCullough*, but we find talk of vested rights to merely state due process conclusions, and thus unnecessarily confusing. The court explains:

1581-82 (1990) (Scalia, J., concurring) (reciting history of the Court's adherence to *Schooner Peggy* while advocating a rule requiring a clear manifestation of legislative intent before courts will recognize retroactive legislation); *see also Griffith* v. *Kentucky*, 107 S. Ct. 708, 712 n.6 (judgment is final for purposes of the constitutional prohibition on retroactive criminal legislation only when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied"). But in *McCullough*, the Court ignored *Schooner Peggy* and the fact that McCullough's case was pending on appeal when Virginia's legislature changed the law, deciding instead that the law applicable to a case "freezes" at the time the trial court renders its judgment. 19 S. Ct. at 142 ("The writ of error to the court of appeals of [Virginia] brought the validity of [the trial court's] judgment into review, and the question presented to that court was whether, *at the time it was rendered*, it was rightful or not.") (emphasis added). The *McCullough* Court may have understood *Schooner Peggy* to apply only to Article III courts, and ignored it for this reason.

> the words "vested right" are nowhere used in the constitution, neither in the original instrument nor in any of the amendments to it. We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. But when we get beyond this, although vested rights may exist, they are better described by some more exact term, as the phrase itself is not one found in the language of the constitution.

Campbell v. *Holt*, 6 S. Ct. 209, 213 (1885). A seminal treatise recognizes what has happened when courts have departed from the Constitution in search of an amorphous "vested rights" theory:

> Judicial opinions are full of standards which purport to govern decision[s] concerning the legality of retroactive application of new law. On close examination most of them turn out to be little more than ways to restate the problem. Probably the most hackneyed example of such a rule is to the effect that a law cannot be retroactively applied to impair vested rights. But the statement of that proposition does nothing more than focus attention on the question concerning what circumstances qualify a right to be characterized as "vested."

NORMAN J. SINGER, 2 SUTHERLAND STATUTORY CONSTRUCTION § 41.05, at 364-65 (C. Sands 4th ed. 1986); *accord Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. at 696. We waste no further time with the "vested rights" language, and turn to due process.

When the Court rendered *McCullough*, it may have held the absolutist view, indicated by the statement quoted above, that the Due Process Clause protects all final judgments from retroactive legislation. But the Court has retreated from this view. The Court permits retroactive legislation to annul private judgments that affect public rights, *Hodges*, 43 S. Ct. at 436, or private injunctions upon changed circumstances.

System Federation No. 91, Ry. Employees' Dept., AFL-CIO v. *Wright*, 81 S. Ct. 368, 371 (1961) (modifying a permanent injunction to conform with subsequently-enacted amendments to the Railway Labor Act). The dispositive retreats from any absolute *McCullough* rule, however, come in *Fleming* v. *Rhodes*, 67 S. Ct. 1140 (1947) and *Usery* v. *Turner Elkhorn Mining Co.*, 96 S. Ct. 2882 (1976).

In *Fleming*, landlords obtained valid final judgments from a Texas court entitling them to evict certain tenants upon the lapse of wartime price regulations. Congress cured the lapse within two months, and included a law which prohibited the eviction of the tenants with its extension of price regulations. 67 S. Ct. at 1141 n.3. A price-control administrator asked a federal district court to apply this law to enjoin the landlords and state officials from executing their judgments, but the district court held that the federal statute violated the Fifth Amendment's Due Process Clause. *Id.* at 1141-42. The Supreme Court reversed, explaining that

> Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through forehanded contracts. Were it otherwise the paramount powers of Congress could be nullified by "prophetic discernment." *The rights acquired by judgments have no different standing*. The protection of housing accommodations in defense-areas through the price control acts may be accomplished by the [administrator] notwithstanding these prior judgments. The preliminary injunctions should have been granted.

Id. at 1144 (footnotes omitted and emphasis added), *cited with approval in Federal Housing Admin.* v. *Darlington, Inc.*, 79 S. Ct. 141, 146 & n.6 ("[A]ny 'vested' rights by reason of the state judgment were acquired subject to the possibility of their dilution through Congress' exercise of its paramount regulatory power.").

Usery arose from Congress' efforts to provide compensation to coal miners and their survivors. The disputed legislation establishes an administrative procedure under which victims of the disease known as "black lung" and their survivors may collect benefits from coal companies, mandates certain presumptions against the coal companies, and operates retroactively. 96 S. Ct. at 2889-90. The companies argued that the statute unconstitutionally deprived them of their property because it imposed upon them "an unexpected liability for past, completed acts that were legally proper and, at least in part, unknown to be dangerous at the time." *Id.* at 2892. The Court responded:

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. . . .
>
> To be sure, insofar as the Act requires compensation for disabilities bred during employment terminated before the date of enactment, the Act has some retrospective effect . . . And it may be that the liability imposed by the Act for disabilities suffered by former employees was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. See *Fleming* v. *Rhodes* . . . .

Id. at 2892-93 (citations and footnotes omitted). The Court then assessed the practical consequences of the Act's retrospective imposition of liability and concluded that this

imposition "is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor . . ." *Id.* at 2893.

The Defendants would have us distinguish *Fleming* and *Usery* on the ground that the Court in neither case permitted a retroactive statute to upset a final, nonappealable judgment; they maintain that the rights created by judgments are sacrosanct above other due process rights, and that the *McCullough* rule endures for judgment-based rights. This argument fails to distinguish *Fleming* or *Usery*.

While the *Fleming* Court noted that the retroactive legislation which it upheld only comprised the landlords' ability to *enforce* their judgment rights as opposed to any compromise of the rights themselves, 67 S. Ct. at 1144, the Court has also recognized (as do we) that the removal of a remedy has the same effect as the removal of a right. *See Chase Sec. Corp.* v. *Donaldson*, 65 S. Ct. 1137, 1142 (1945) ("[I]t is troublesome to sustain as a 'right' a claim that can find no remedy for its invasion."); *Lynch* v. *United States*, 54 S. Ct. 840, 844 (1934) ("Contracts between individuals or corporations are impaired . . . whenever the right to enforce them is taken away or materially lessened.").

Usery teaches that Congress can, under some circumstances, create private civil liability for past acts. We recognize nothing in the *Usery* Court's analysis that would limit Congress from retroactively creating liability for securities fraud if it justified this retroactive effect with reasons comparable to those recited in *Usery*. *See* 96 S. Ct. at 2893-94. Because *Usery* allows Congress to avert questions of judgment rights altogether, there is no due process reason why Congress cannot reach the same result by upsetting a judgment.

Moreover, FED. R. CIV. P. 60(b) itself destroys the Defendants' position that final, nonappealable judgments confer sacrosanct due-process rights on individuals. Rule 60(b) permits courts to "relieve a party . . . from a final judgment . . . for . . . any . . . reason justifying relief from the operation of the judgment." The Court has repeatedly

acknowledged that Rule 60 "provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.'" *Liljeberg* v. *Health Servs. Acquisition Corp.*, 108 S. Ct. 2194, 2204 (1988) (citation omitted). The Tenth Circuit is especially likely to disturb final judgments under Rule 60(b) upon subsequent changes in the law: "a change in relevant case law by the United States Supreme Court warrants relief under Fed. R. Civ. P. 60(b)(6)." *Adams* v. *Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 702 (10th Cir. 1989).

Rule 60(b) has spawned an extensive jurisprudence; no doubt remains as to its constitutionality. And we know of nothing to indicate that an individual holds any greater constitutional right against one branch of government than she holds against another. This reasoning establishes that, despite *McCullough*, judgments that are final and nonappealable do not create rights that are absolutely immune from congressional manipulation.

It is not our place to state general rules as to when the Due Process Clause permits Congress to disturb judgments. We limit our inquiry to the facts before us. Fortunately, the Court provides ample guidance in *Donaldson*. *See* 65 S. Ct. at 1141-43.

Donaldson sued a securities broker under Minnesota statutory and common-law fraud theories. A state judge ruled that the broker violated the Minnesota securities statute and that Donaldson timely filed his claim because his absence from the state tolled Minnesota's limitations period. Minnesota's Supreme Court held the latter ruling erroneous, and remanded for further proceedings. *Id.* at 1138. Meanwhile, Minnesota's legislature enacted a limitations statute which permitted any securities fraud claim to be brought within one year of the statute if the securities were delivered more than five years before the statute's enactment date. Donaldson met the five year delivery requirement and availed himself of the new statute in Minnesota's courts. *Id.* at 1139. The broker appealed to the Supreme Court, arguing that Minnesota deprived him of due process by applying the new limitations

period to him. We quote extensively from the Court's unanimous refutation of this argument because we find it applicable here:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witness have died or disappeared, and evidence has been lost. . . . They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.
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> . . . .
>
> . . . . The Fourteenth Amendment [Due Process Clause] does not make an act of state legislation void merely because it has some retrospective operation. . . . Some rules of law probably could not be changed retroactively without hardship and oppression . . . Assuming that statutes of limitation like other types of legislation could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment. Nor has the appellant pointed out special hardships or oppressive effects which result from lifting the bar in this class of cases with retrospective force. This is not a case where appellant's conduct would have been different if the present rule had been known and the change foreseen. It does not say, and could hardly say, that it sold unregistered stock depending on a statute of limitation for shelter from liability. The nature of the defenses shows

> that no course of action was undertaken by appellant on the assumption that the old rule would be continued. When the action was commenced, it no doubt expected to be able to defend by invoking Minnesota public policy that lapse of time had closed the courts to the case, and its legitimate hopes have been disappointed. But the existence of the policy at the time the action was commenced did not, under the circumstances, give the appellant a constitutional right against change of policy before final adjudication.

Id. at 1142-43 (citations and footnotes omitted).

The Defendants understandably stress the last phrase of the quoted passage, and observe that while *Donaldson* permits a legislature to retroactively change limitations periods, it says nothing about whether a legislature can divest a party of a final judgment. The problem with this argument is that *Donaldson* predates both *Fleming* and *Usery*, which we understand to establish that Congress may upset final judgments under some circumstances. To decide whether § 27A(b) can constitutionally upset final judgments, we observe that the Court in *Donaldson, Fleming* and *Usery* invariably considered *whether the legislature acted rationally toward the party asserting a due process violation* to determine whether retroactive legislation deprived those parties of rights without due process.[13]

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13. Even before *Usery*, one commentator comprehensively surveyed the Court's decisions concerning the constitutionality of retroactive legislation, and concluded that three inquiries, none of them dispositive, inform the Court's rationality decisions: 1) the nature of the public interest served by the retroactive enactment; 2) the extent of the abrogation of the preenactment right; and 3) the nature of the right affected by a retroactive statute. Constitutionality of Retroactive Legislation, 73 HARV. L. REV. at 697, 711, 717. He considers a statute that retroactively upsets final judgments primarily under the third criteria, and explains:

> the Court has indicated that it would be reluctant to permit the legislature to interfere with a right which has been "adjudicated . . . in final and unreviewable determination." However, it must be remem-

In *Fleming*, the Court understood the landlords asserting due process rights to have taken advantage of an inadvertent two-month lapse in price-control regulation to defense-area housing during wartime, and held that Congress could rationally exercise its commerce authority to deny them this advantage. 67 S. Ct. at 1143-44. In *Usery*, the Court analyzed the effect of the retroactive legislation on the coal companies to determine whether the legislation "me[t] the test of due process" and concluded that the legislation was "justified as a rational measure to spread the costs of the employees' disabilities." 96 S. Ct. at 2893. Likewise, as we quote above, the *Donaldson* Court carefully considered the effect of the retroactive limitations statute on the broker before holding that Minnesota's legislature worked no injustice. 65 S. Ct. at 1143. And recently, the Court upheld a statute that retroactively assessed a fee for use of the Iran-United States Claims Tribunal against a due process challenge by applying this standard: "the test of due process" for "[t]he retroactive aspects of legislation" is met if "the retroactive application of the legislation is itself justified by a rational legislative purpose." *United States* v. *Sperry Corp.*, 110 S. Ct. 387, 396 (1989) (quoting *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 104 S. Ct. 2709, 2718 (1984)).

Donaldson frees us from speculating as to the bounds of due-process rationality when a legislature promulgates retroactive laws. Like the statute at issue in *Donaldson*, § 27A(b) restores a remedy that PMLI and Simmons lost

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bered that this is only one of many considerations in determining the constitutionality of retroactive legislation, and in any given case, the Court may deem the interests in the retroactive application of the statute to a right which has been reduced to judgment prior to its enactment sufficient to outweigh the disadvantages of such application. Such a case was *Fleming* v. *Rhodes* . . .

Id. at 718-19.

through lapse of time. Like the fraud-based cause of action at issue in *Donaldson*, the Defendants' conduct would not have been different if they would have foreseen § 27A(b). Like the effect of the retroactive legislation at issue in *Donaldson*, § 27A(b) subjects the Defendants to a lawsuit.

As a matter of practical effect on the parties, § 27A(b) differs from the *Donaldson* legislation in one important respect. The *Donaldson Court* characterized the broker's expectation that the limitation law would remain as it was when suit was filed as a "legitimate hope[]," yet held this expectation insufficient to render Minnesota's retroactive limitations statute violative of due process. *Id.* Section 27A(b) represents Congress' complementary view that courts should honor the expectations of plaintiffs and defendants as they ascertained § 10(b) limitations law upon the filing of these suits before *Lampf*. Section 27A(b) fulfills the hopes that the *Donaldson* Court found legitimate, and is thus a stronger candidate for retroactivity than the statute upheld by the Court; strong enough, we hold,[14] to upset the Defendants' final, nonappealable judgments.

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14. By this statement, we recognize that § 27A(b) should survive any heightened scrutiny required for retroactive legislation that upsets a judgment. We do not imply that retroactive legislation necessarily receives heightened scrutiny if it upsets a final judgment. A judgment for money is a species of property right, and we see no reason why the Constitution accords any more protection to an individual's right to her money when this right is represented by a judgment than when this right is represented by a savings passbook. *See Tonya K. by Diane K.* v. *Board of Educ. of Chicago*, 847 F.2d 1243, 1247 (7th Cir. 1988) ("once the court has fixed property rights by judgment, the legislature has no greater power over this form of property than over any other."). The Supreme Court, this court, and others have consistently permitted legislatures to retroactively affect individuals' rights to money by applying a rationality standard. *See Sperry*, 110 S. Ct. at 396-97; *Pension Benefit Guar. Corp.*, 104 S. Ct. at 2718; *Usery*, 96 S. Ct. at 2893; *Wright* v. *Union Central Life Ins. Co.*, 58 S. Ct. 1025, 1031-34 (1938); *Hoffman* v. *City of Warwick*, 909 F.2d 608, 618-19 (1st Cir. 1990); *Fust* v. *Arnar-Stone Lab., Inc.*, 736 F.2d 1098, 1100 (5th Cir. 1984); *DiPippa* v. *United States*, 687 F.2d 14, 19 (3d Cir. 1982).

b. The Right to a Statute of Repose

The Defendants argue that even if Congress can legitimately upset their judgments with § 27A(b), the statute still contravenes due process because it creates civil liability for past acts. Their argument rests on *William Danzer & Co.* v. *Gulf & S.I.R.R.*, 45 S. Ct. 612 (1925), where the Court distinguishes between time-bar statutes that bar the *remedy* of suit in court, and those that extinguish the *liability* altogether. *Id.* at 613; *see also Donaldson*, 65 S. Ct. 1141 n.8 (distinguishing *Danzer* according to its remedy/liability dichotomy). If a time-bar statute extinguishes liability, the *Danzer* Court held that a legislature cannot constitutionally amend such a statute to revive liability once extinguished. 45 S. Ct. at 613. To do so would "retroactively . . . create liability" and thus "deprive the defendant of its property without due process of law in contravention of the Fifth Amendment." *Id.*

The Defendants point to the *Lampf* Court's distinction between a one-year statute of limitation and a three-year statute of repose, and its holding that Congress effectively created this time-bar structure in 1934. *See* 111 S. Ct. at 2780. They observe that, like the statute at issue in *Danzer*, the three-year repose period recognized by the *Lampf* Court is an absolute bar not subject to equitable tolling. *Compare id.* at 2782 *with Danzer*, 45 S. Ct. at 613. From this, they reason that Congress in 1934 enacted an absolute three-year limit on *liability* for § 10(b) violations. Because § 27A(b) operates in these cases to lift this three-year outside limit, the Defendants argue that the statute "retroactively . . . creates liability" in contravention of due process according to *Danzer*.

As a preliminary matter, we note that the *Usery* Court squarely held that Congress may retroactively create liability for past acts, and thus compromises *Danzer's* holding that such legislation *per se* contravenes due process. *See Usery*, 96 S. Ct. at 2893 (legislation is not unlawful solely because "the effect of the legislation is to impose a new duty or liability based on past acts") (citations omitted). The Court has also questioned the continued validity of a dichotomy between remedy and right, at least where extinction of the

remedy has the same effect as extinction of the right. *See Donaldson*, 65 S. Ct. at 1142; *see also Lynch*, 54 S. Ct. at 844. And the last time a party asked the Court to apply *Danzer*, the Court did not even make a determination as to whether the time-bar statute at issue affected remedy or liability. *International Union of Elec., Radio & Mach. Workers* v. *Robbins & Myers, Inc.*, 97 S. Ct. 441, 450-51 (1976).

But even if *Danzer* remains good law, it does not help the Defendants. *Danzer* and its progeny are inapposite to statutes that bar remedies, while leaving liability intact. We need look no further than *Lampf* to determine whether the three-year statute of repose asserted by the Defendants bars liability.

The *Lampf* Court strove for crystal clarity in stating its holding: "[T]he governing standard for an action under § 10(b) [is] the language of § 9(e) of the 1934 Act, 15 U.S.C. § 78i(e)." 111 S. Ct. at 2782 n.9. Section 9(e), as passed by Congress in 1934, provides:

> No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

This language unequivocally bars an action to enforce a liability, and says nothing about the continued existence of that liability. Nowhere does the *Lampf* Court even imply that the absolute three-year statute of repose extinguishes liability under § 10(b). We hold that it does not.

This holding conflicts with the Tenth Circuit's holding in *Anixter* v. *Home-Stake Production Co.*, 939 F.2d 1420, 1434 (10th Cir. 1991) that § 13 of the 1934 Act limits liability and not remedy. The *Lampf* Court relied upon § 13 to hold that § 9(e) governs § 10(b) limitations periods, yet mentioned nothing about limitation of liability. 111 S. Ct. 2780 & n.7. And like § 9(e), the language of § 13 unequivocally indicates

a limitation of remedy, not of liability.[15] We disagree with the *Anixter* court's opposite conclusion.

The Defendants wrongly assume that a statute of repose must go to liability rather than remedy. *See City of El Paso* v. *Simmons*, 85 S. Ct. 577, 582 n.9 ("[T]he statute of repose challenged here is an alteration of remedy rather than obligation."). They are also mistaken that a time-bar statute limits liability merely because a legislature structures it as an absolute bar that is not subject to equitable tolling. In *Short* v. *Belleville Shoe Manufacturing Co.*, 908 F.2d 1385 (7th Cir. 1990), the court discussed § 13 as follows:

> Courts say that equitable tolling does not apply under § 13, but this is not strictly accurate. It is better to say that equitable tolling and related doctrines do not extend the period of limitations by more than the two-year grace period § 13 allows. Congress did not obliterate these valuable doctrines so much as it set bounds on the length of delay.

Id. at 1391 (citations omitted). Rather than assess whether a statute is characterized as one of repose or limitation, or whether it is subject to equitable tolling, the relevant inquiry under *Danzer* is whether the legislature intended liability or remedy to be extinguished by a time bar. *Donaldson*, 65 S. Ct. 1141 n.8. The primary evidence of this intent is, of course, the language of the statute.[16] In this case, we

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15. Section 13 provides:

> In no event shall any such action be brought to enforce a liability created under § 77k or 771(1) of this title more than three years after the security was bona fide offered to the public, or under § 771(2) of this title more than three years after the sale.

15 U.S.C. § 77m.

16. The Ninth Circuit has distinguished *Danzer* by applying a presumption that time bar statutes "go to matters of remedy only." *Starks* v. *S.E. Rykoff & Co.*, 673 F.2d 1106, 1109 (9th Cir. 1982).

understand Congress to have decided in § 9(e) that the three-year time bar goes to remedy only.

Accordingly, the Defendants have failed to establish that § 27A(b) unconstitutionally deprives them of any right.

2. *Judicial Authority*

The Defendants next invite us to strike § 27A(b) as an affront to our Article III authority even if it does not contravene their constitutional rights. Other courts have considered some of the exact arguments made by the Defendants, and we draw on their wisdom before reaching the Defendants' novel contentions.

a. *Beam and Klein*

The Defendants present the same *Beam* argument that the district court describes in *Simmons*, 786 F. Supp. at 592-94, and the Ninth Circuit describes in *Gray*, 989 F.2d at 1571-72. We adopt the Ninth Circuit's analysis rejecting this argument insofar as it explains why any constitutional rule articulated in *Beam* does not limit Congress' powers under Article I. *Id.* at 1572; *accord Cooke*, 1993 WL 248257 at *8; *Berning*, 990 F.2d at 277-78. The Defendants also argue that § 27A(b) affects the outcome of cases without changing the law in violation of the rule announced in *United States* v. *Klein*, 80 U.S. 128 (1871). We adopt the analysis of the Eleventh Circuit in *Scientific-Atlanta*, 971 F.2d at 1572, which explains that § 27A respects *Klein* by changing the law. *Accord Cooke*, 1993 WL 248257 at *8; *Berning*, 990 F.2d at 278-79; *Gray*, 989 F.2d at 1568-70; *Anixter*, 977 F.2d at 1544-46.

b. Pure Retroactivity

The Defendants also contend that Article I does not confer authority upon Congress to enact purely retroactive legislation. We view such a blanket prohibition as tantamount to a civil Ex Post Facto Clause, something that the Court has explicitly refused to recognize. *See Galvan* v. *Press*, 74 S. Ct. 737, 743 n.4 ("The Court . . . has undeviatingly enforced the

. . . position, first expressed in *Calder* v. *Bull*," that "the *ex post facto* Clause applies only to prosecution for crime. . . . It would be an unjustifiable reversal to overturn a view of the Constitution so deeply rooted and so consistently adhered to.") (citation omitted); *cf. Cummings* v. *Bostwick*, 481 F. Supp. 1251, 1254 & n.6 (D. N.H. 1980) (the constitutions of Colorado, Georgia, Idaho, Missouri, New Hampshire, Ohio, Tennessee and Texas explicitly prohibit all retroactive legislation).

To the contrary, the Court has held that a statute is not unconstitutional merely for its retroactivity. *See Usery*, 96 S. Ct. at 2893; *see also Scientific-Atlanta*, 971 F.2d at 1573 (rejecting argument that § 27A transgresses separation of powers doctrine because it is purely retroactive). The Defendants do not adequately distinguish *Usery* by explaining that the statute at issue in that case had some prospective effect. The *Usery* Court nowhere predicates its blessing of retroactive legislation on an associated prospective component. Indeed, the Court has before upheld purely retroactive legislation against a separation-of-powers challenge. *See United States* v. *Sioux Nation of Indians*, 100 S. Ct. 2716, 2745 (1980). The Constitution imposes no bar on purely retroactive legislation *per se*.

c. Final Judgments

Lastly, the Defendants assert that § 27A(b) unconstitutionally usurps judicial authority by upsetting final judgments.[17] They say that § 27A(b) places Congress in the position of a super-appellate court, exercising review authority over the Supreme Court and its decisions in *Lampf* and *Beam*.

To define the constitutional separation of legislative and judicial authority, the Court focuses upon "the practical

17. The Ninth Circuit pretermitted this question in *Gray*. *See* 989 F.2d at 1571.

effect that the congressional action will have on the constitutionally assigned role of the federal judiciary." *Commodity Futures Trading Comm'n* v. *Schor*, 106 S. Ct. 3245, 3257 (1986). Under this standard, we find § 27A(b) harmless.

With § 27A(b), Congress did not overrule decisions of the Supreme Court. As we have held through *Scientific-Atlanta*, Congress changed the law after final judgment in *Lampf* and *Beam*, giving plaintiffs a new right to assert in Court through a reinstatement motion. The Defendants understandably claim a violation of *their* constitutional rights by this action, but § 27A(b) takes no authority from the judiciary. Most significantly, § 27A(b) leaves the final resolution of securities-fraud disputes to the courts — we will decide, indeed are here deciding, which controversies will end in dismissal despite § 27A(b). If we understood a statute's purpose to be the reversal of results in particular controversies between private individuals, we would strike the statute as violative of our authority to decide cases. *See, e.g., United States* v. *O'Grady*, 89 U.S. 641, 648 (1875) (finding that the Treasury Secretary invaded judicial authority by offsetting a court's judgment with claimed, but unlitigated tax liability). But § 27A(b) is innocent on this score.

By upsetting final judgments, § 27A(b) at most denies us some authority to say when a controversy is over. There is no constitutional impediment to this denial if we share authority with Congress to say when a controversy is done. In *Sioux Nation*, the Court held that the Constitution does not forbid Congress from mandating that a controversy continues when the Court says that it is done.

The Sioux Nation brought a Fifth Amendment takings claim against the United States because our government breached a treaty obligation to reserve the Black Hills of South Dakota to the Sioux. The United States Court of Claims dismissed the Sioux Nation's claim for interest on the value of the seized property as barred by res judicata. *United States* v. *Sioux Nation of Indians*, 518 F.2d 1298, 1306 (Ct. Cl. 1975). The Supreme Court denied certiorari. 96 S. Ct.

449 (1975). Three years later, Congress directed the Court of Claims to review the claim's merits without consideration of res judicata. *See* 25 U.S.C. § 70s(b); 100 S. Ct. at 2727. After the Court of Claims ruled in favor of the Sioux Nation, the government appealed, asserting that § 70s(b) violates the constitutional separation of legislative and judicial authority. The Court upheld § 70s(b), permitting Congress to say that a controversy continues after the Court has said that it does not. 100 S. Ct. at 2735-36; *see also Tonya K.*, 847 F.2d at 1247 (citing *Sioux Nation* for the proposition that "Congress may invite a court to reconsider even when it may not dictate the outcome").

Schooner Peggy and its extensive progeny also represent compelling evidence that the Constitution permits Congress and the judiciary to share authority in deciding when a court is finished deciding a particular controversy between individuals. *See* 5 U.S. (1 Cranch) at 110. With the exception of *McCullough*,[18] the Court has repeatedly observed Chief Justice Marshall's admonition that appellate courts must decide cases according to the law that exists when they decide, not the law that existed when the lower court rendered its decision.

In an extreme and stringent application of this rule, the Court rendered *149 Madison Avenue Corp.* v. *Asselta*, 67 S. Ct. 1726, *modifying*, 67 S. Ct. 1178 (1947). The *149 Madison Avenue* Court had affirmed a judgment for overtime pay due plaintiffs. 67 S. Ct. at 1184. But before the time for rehearing had run, Congress retroactively created a defense for the defendants, who asked the Court to reconsider its affirmance in light of the change in law. The Court changed its judgment from an affirmance to a remand so that the district court could consider the case in light of the new law. 67 S. Ct. at 1726. The district court eventually entered judgment for the

18. *See* note 12, *supra*.

defendants. *Asselta* v. *149 Madison Ave. Corp.*, 90 F. Supp. 442 (S.D.N.Y. 1950).

Of course, the rule announced in *Schooner Peggy* does not depend on whether the intervening law helps a particular party. Courts must apply the new law regardless of whether it ends a case that the court otherwise would have remanded for further proceedings. Thus, we interpret *Schooner Peggy* to support the constitutional proposition that Congress and the judiciary share authority to decide when the judiciary's word on a controversy is its last.

The Defendants have articulated no constitutional reason why these controversies should not continue.

III. CONCLUSION

We REVERSE the orders of the district courts and reinstate the cases. We REMAND for further proceedings consistent with this opinion.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

RICHARD E. WINDHORST, JR.
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

July 20, 1993

MEMORANDUM TO COUNSEL OR PARTIES
LISTED BELOW

No. 92-1662 — *Pacific Mutual* v. *First Republicbank*
No. 92-3375 — TGX Corp. v. *Simmons, et al.*

Enclosed is a copy of the Court's decision this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, FRAP and Local Rules 39 and 41 govern costs, petitions for rehearing and mandates. *A petition for rehearing must be filed in the Clerk's Office within fourteen (14) days from this date. Placing the petition in the mail on the 14th day will not suffice.*

The judgment entered provides that appellees pay to appellants the costs on appeal.

Very truly yours,

RICHARD E. WINDHORST, JR., Clerk

By:

_____
Deputy Clerk

Enclosure
All counsel of record

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PACIFIC MUTUAL LIFE INSURANCE CO.,	*	
Plaintiff,	*	
v.	*	Civil. No. 3:91-CV-0441-H
FIRST REPUBLICBANK CORPORATION,	*	
IFRB Corporation,	*	
Morgan Stanley and Co., Inc.,	*	
Goldman Sachs & Co.,	*	
Ernst & Young & Co.,and	*	
Salomon Brothers, Inc.,	*	
Defendants.	*	

MEMORANDUM OPINION AND ORDER

Before the Court are Plaintiff's Motion to Reinstate Action and supporting memorandum, filed January 31, 1992; Defendants' Response in Opposition to Plaintiff's Motion, filed February 20, 1992; Plaintiff's Reply Memorandum, filed March 2, 1992; Plantiff's letter to the Court, dated March 5, 1992; Defendant's letter to the Court, dated March 9, 1992; Plaintiff's letter to the Court, dated March 10, 1992; Defendants' letter to the Court, dated April 3, 1992; Plaintiff's letter to the Court, dated April 16, 1992; and Plaintiff's letter to the Court, dated April 29, 1992.

On June 8, 1992, pursuant to 28 U.S.C. § 2403(a), the Court certified its intent to find unconstitutional the Federal

Deposit Insurance Corporation Improvement Act of 1991 (''FDICIA''), Pub. L. No. 102-242, § 476, 105 Stat. 2236 (1991), and directed the United States to file any pleadings in support of the constitutionality of this statute by July 8, 1992. Accordingly, there is also before the Court the Statement of Interest of the United States and the Securities and Exchange Commission, filed July 6, 1992.

I. Factual Summary

This is a securities fraud case brought by Plaintiff Pacific Mutual Life Insurance Co. (''Pacific Mutual'') on March 1, 1991. The lawsuit arises from Pacific Mutual's purchase in July and September 1987 of Inter-First 12-¾% Notes due October 1, 1989. Pacific Mutual seeks compensatory damages under Section 10(b) of the Securities Exchange Act of 1934 (''Exchange Act''), 15 U.S.C. § 78j(b) and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, and compensatory and punitive damages for common law fraudulent misrepresentation. Pacific Mutual's claims are based on allegedly false and misleading statements that were made no later than December 1987.

On August 16, 1991 the Court granted Defendants' motions and dismissed with prejudice Plaintiff's federal-law claims as time-barred, and dismissed without prejudice Plaintiff's pendent state-law claims. *See* Memorandum Opinion and Order, dated August 16, 1991 (''MOOP''). The Court's ruling was premised on the Supreme Court decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (June 20, 1991), which established that claims arising under Section 10(b) of the Exchange Act must be governed by a federal statute of limitations. To this end, the Supreme Court selected as the governing standard for an action under Section 10(b) the language of Section 9(e) of the Exchange Act, and concluded that such action must be

commenced within one year after discovery of the facts constituting the violation and within three years after such violation (''1-and-3 year statute of limitations'' or simply the ''*Lampf* rule''). *Id.* at 2782 & n. 9.

Retroactive application of *Lampf* to this case was justified by the fact that the Supreme Court itself had applied the newly articulated statute of limitations in *Lampf* retroactively to the circumstances then pending before it. In a decision issued the same day as *Lampf*, the Supreme Court *required* retroactive application of the 1-and-3 year statute of limitations to Section 10(b) actions, stating,

> [o]nce retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application. The applicability of rules of law are not to be switched on and off according to individual hardship. . . .
>
> . . .
>
> [W]hen the court has applied a rule of law to litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata.

James B. Beam Distilling Co. v. *Georgia*, __ U.S. __ 111 S. Ct. 2439, 2447-48 (June 20, 1991). Although a plurality opinion, six Justices in *Beam* agreed in the judgment of the Court that once a new rule of law is applied retroactively in one case it must also be applied to all other pending cases involving the same issue. For a detailed discussion of the Justices' positions on this issue, see MOOP at 4-6.

A final judgment has been entered in this case, and it has not been appealed. Pacific Mutual instead has initiated an action in the 192nd District Court of Dallas County asserting its common-law fraud claims.

Congress responded to the Supreme Court's ruling in *Lampf* with passage of the FDICIA which was signed into law by the President on December 19, 1991. FDICIA specifically amended the Exchange Act by adding Section 27(A) which provides in relevant part,

> (b) **EFFECT ON DISMISSED CAUSES OF ACTION.** — Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991 —
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by plaintiff not later than 60 days after the date of enactment of this section.

Pub. L. No. 102-242, § 476, 105 Stat. 2236. With passage of FDICIA, Congress aimed to remove the retroactive application of *Lampf* and correct "the most adverse effects" of the decision. 178 Cong. Rec. S18624 (daily ed. Nov. 27, 1991)(statement of Sen. Bryan). Congress left untouched the prospective application of the *Lampf* rule.

Pacific Mutual now argues that reinstatement of its federal securities claims in this action is warranted, because Section 27(A) requires application of the statute of limitations prevailing in the relevant jurisdiction on June 19, 1991; and that accordingly, the statute of limitations in the Fifth Circuit for Section 10(b) actions at that time was four years. *See Sioux Ltd., Sec. Litigation* v. *Coopers & Lybrand*, 914 F.2d 61, 64 (5th Cir. 1990). Commencement of this action on March 1, 1991 falls within this four year period. Pacific Mutual further

urges this Court to exercise pendent jurisdiction, and reinstate as well its common law fraud claims.

Defendants Ernst & Young, Goldman Sachs & Co., Morgan Stanley & Co. Incorporated and Salomon Brothers Inc. (collectively "Defendants") oppose reinstatement on the grounds that Section 27(A) is unconstitutional.

The United States speaks only in support of the constitutionality of Section 27(A).

II. Analysis

There appears to be no dispute that if the terms of Section 27(A) are applied to this case, Pacific Mutual is entitled to reinstatement of its federal securities claims. Consequently, the sole issue before the Court is the constitutionality of Section 27(A). Several district courts have had occasion to consider the constitutionality of Section 27(A).[1] Yet, the diversity of their opinions combined with the fast changing field of jurisprudence surrounding Section 27(A) make the constitutional inquiry before the Court a live and contested one.[2]

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1. It should be noted that some courts have applied Section 27(A) without considering its constitutionality. By way of example, see: *Adams Ass., et al.* v. *JEM Management Ass. Corp., et al.*, 1992 U.S. Dist. LEXIS 1283 (S.D.N.Y. February 7, 1992); *Schick, et al.* v. *Ernst & Young*, 1992 U.S. Dist. LEXIS 221 (S.D.N.Y. January 13, 1992); *Ahmed, et al.* v. *Trupin, et al.*, 1992 U.S. Dist. LEXIS 207 (S.D.N.Y. January 10, 1992); *Ades, et al* v. *Deloitte & Touche, et al.*, 1992 U.S. Dist. LEXIS 12 (S.D.N.Y. January 3, 1992).

The United States also has cited to a circuit court case which has upheld the constitutionality of Section 27(a), purely in the form of dicta and absent any substantive discussion. *See Litton Industries, Inc.* v. *Lehman Brothers Kuhn Loeb Inc.*, Nos. 464, 589, 91-7643, 91-7697, 1992 WL 135101, at *8 n.6 (2nd Cir. June 17, 1992).

2. The Court is aware of the two decisions in the Northern District of Texas which have involved application of Section 27(A). *See Southwest Realty, Ltd.* v. *Daseke, et al.*, No. CA3-89-3055-D, slip op. at 29 (N.D.

A particularly apt predicate to the Court's analysis in this case is the fundamental principle that a statute approved by both Houses of the Congress and signed by the President should be invalidated only "for the most compelling constitutional reasons," *Bowsher* v. *Synar*, 478 U.S. 714, 736 (1986), after having resorted to every reasonable construction capable of saving the statute from constitutional infirmity, *Communications Workers* v. *Beck*, 487 U.S. 735, 762 (1988). Courts, however, cannot sustain a congressional enactment that contravenes established constitutional principles. *Id.*

Defendants challenge the constitutionality of Section 27(A) on two grounds. First, Defendants argue that Section 27(A) improperly prescribes a limitation period for the select group of Section 10(b) securities cases filed on or before June 19, 1991 without changing the underlying law, and thus it violates the separation of powers doctrine. Second, Defendants argue that Section 27(A) improperly invades the province of the judiciary by requiring Article III courts to reinstate dismissed actions, and thus eviscerate the principle of finality.

The Court is in agreement that Section 27(A) is unconstitutional for it violates established separation of powers principles, but not for the reasons articulated in Defendants' first argument. As discussed below, Section 27(A) in fact does effectuate a change in the law, and thus does not entail outcome determinative direction to the judiciary in a select group

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Tex. May 21, 1992); *Bancroft, et al.* v. *Kneipper, et. al.*, CA3-90-2754-D, slip op. at 9 (N.D. Tex. April 30, 1992). The circumstances in these cases are distinct, and on both occasions, the court reserved the right to find the statute unconstitutional at a later time.

of cases. Section 27(A), however, offends the separation of power principles in abolishing the retroactive application of the *Lampf* rule mandated as a matter of *constitutional* law by *Beam*. Section 27(A) is additionally violative of the constitution by undermining the finality of the judgment entered in this case, and the constitutionally protected rights which had vested in Defendants as a result of such judgment.

In their first argument, Defendants assert that Section 27(A) violates the separation of powers in that Congress directs courts to apply a rule of decision of its preference in a specified category of cases while leaving the underlying law unchanged.

Defendants' first argument is without merit. The fact that Congress chose to incorporate the statute of limitations existing in the applicable jurisdiction, rather than prescribe a specific statute of limitations for Section 10(b), has no bearing on whether a change has occurred in the law. *See Robertson* v. *Seattle Audubon Society*, ___ U.S. ____, 112 S. Ct. 1407, 1413, (March 25, 1992).[3] It is beyond question that the

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3. Defendants cite to cases where the courts found the separation of powers principle offended by Section 27(a), because Congress had directed a particular outcome without changing the underlying law. *See In re Brichard Securities Litigation*, 788 F. Supp. 1098 (N.D. Cal. March 27, 1992); *Bank of Denver* v. *Southeastern Capital Group, Inc.*, 1992 U.S. Dist. LEXIS 3764 (D. Col. March 20, 1992); and *Johnston, et al.* v. *Cigna Corporation, et al.*, 1992 U.S. Dist. LEXIS 3666 (D. Col. March 20, 1992). This Court is not persuaded by the reasoning of these cases, and instead aligns itself with the cases cited *supra* holding that by enactment of Section 27(A), Congress effectuated a change in the law. However, as discussed below, this determination does not bring an end to the Court's consideration of the separation of powers principle and the constitutionality of Section 27(a). *See infra* pages 9-15.

enactment of Section 27(A) effectuated a change in the law. *See, e.g., Hastie* v. *American Agri-Corp.*, No. SACV89-433 GLT, slip. op at 7-8 (C.D. Ca. April 20, 1992); *Hindler, Inc. et al* v. *Telequest, Inc., et al*, Civ. No. 89-0847, slip op. at 2-3 (S.D. Cal. March 31, 1992); *VenturTech Il. Limited Partnership et al.* v. *Deloitte Haskins & Sells, et al.*, No. 88-1012-Civ-5-H, slip op. at 3-4 (E.D.N.C. February 24, 1992); *Ayers, et al.* v. *Sutliffe, et al.*, 1992 U.S. Dist. Lexis 3219, at *4 (S.D. Ohio February 11, 1992); *James Bankard, et al.* v. *First Carolina Communications, Inc. et al.*, 1992 U.S. Dist. LEXIS 53, at *17-18 (N.D. Ill. January 3, 1992).

In their second argument, Defendants claim that dismissal with prejudice of Pacific Mutual's claims as time barred vested in them the fundamental "right of repose" which can not be taken away by subsequent legislation.

It is clear that statutes of limitations do not by themselves create "fundamental rights," and that they instead are necessary and pragmatic procedural devices "subject to a relatively large degree of legislative control." *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 314, (1945). For this reason, courts have found no constitutional violation in applying Section 27(A) to cases where a final judgment has not been entered. *See Hastie, supra*, slip op. at 8; *VenturTech II, supra*, slip. op. at 4.

However, where a once existing statute of limitations results in the *final* adjudication of a case, a change in the applicable period of limitations if applied retroactively to reinstate that case implicates constitutional guarantees. *See Chase Securities Corp.*, 325 U.S. at 310, 316. The Supreme Court has held consistently that,

> It is not within the power of a legislature to take away rights which have once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.

McCullough v. *Virginia*, 172 U.S. 102, 123-24 (1898). *See also Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 113 (1948); *Hodges* v. *Snyder*, 261 U.S. 600, 603 (1923); *de Rodulfa* v. *United States*, 461 F.2d 1240, 1252 (D.C. Cir.), *cert. denied*, 409 U.S. 949 (1972). These cases have given rise to the so called "vested rights" doctrine. *Georgia Ass'n of Retarded Citizens* v. *McDaniel*, 855 F.2d 805, 810 (11th Cir. 1988), *cert. denied*, 490 U.S 1090 (1989).

The United States urges this Court not to extend the same constitutional protection afforded a final judgment on the merits to a final judgment resulting from a mere technicality, such as a lapsed statute of limitations.[4] Some courts have upheld the constitutionality of Section 27(A) based on the distinction proposed by the United States, stating:

> Legislation to alter such a technical defense, and its application even to dismissed cases, goes far less to the

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4. Along the same lines, the United States also argues that the Defendants do not have a "vested right" in a final judgment resulting from application of the statute of limitations, and relies on *Capello* v. *District of Columbia Board of Education*, 699 F. Supp. 14 (D.D.C. 1987) for this proposition. In *Capello*, the court upheld the validity of an amendment to the Education of the Handicapped Act, 20 U.S.C. § 1415 (1986), which reinstated an attorney fee award previously held impermissible by the Supreme Court. The court applied the amendment to the application for fees *pending* before it, and found that while the application was pending, the government had not acquired a vested right in being free from payment of fees. *Id.* at 18-19. This case has no bearing on vested rights arising from final judgments based on the merits or otherwise.

> heart of the judicial function than would a legislative attempt to reverse adjudications which had addressed the true merits of the disputes in question.

Alex Johnson, Inc. v. *Arthur Andersen & Co.*, No. 89-9469, slip. op. at 16 (S.D.N.Y. April 25, 1992); *see also Brown* v. *The Hutton Group*, 1992 U.S. LEXIS 5818, at *24 (S.D.N.Y. April 27, 1992).

Perhaps if it were only a question of degree — which type of legislative action more offends the independence of the judiciary—the proposed distinction would be tenable. Separation of powers, however, is not a subject open to compromise. A small encroachment on the judicial function threatens to unravel the constitutional design, even if in an incremental fashion. Supreme Court rulings on the inviolability of final judgments do not allow for such a distinction.[5]

It is important to recognize that it is not the statute of limitations which at any given point in time vests in the

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5. The United States argues that the Supreme Court ruling in *United States* v. *Sioux Nation of Indians*, 488 U.S. 371 (1980), supports the type of distinction it proposes. In *Sioux Nation*, the Supreme Court upheld the validity of a congressional statute despite the fact that it allowed for the relitigation of claims against the United States by the Sioux Indians. In so finding, the Supreme Court stated that "Congress' mere waiver of the *res judicata* effect of a prior judicial decision rejecting the validity of a legal claim *against the United States* does not violate the doctrine of separation of powers." *Id.* at 407 (emphasis added). This ruling was premised on the government's moral duty to pay a debt for which it was obligated, and the recognition that Congress itself is the government and is entitled to waive the protection to which it is entitled. *Id.* at 397-98. In the instant case, where the government is not the party affected by a final judgment, *Sioux Nation* does not call for a distinction between final judgments resulting from adjudication on the merits and those resulting from application of technical rules of procedure.

Defendants a constitutional right, but rather it is the finality of judgment which resulted from application of the *Lampf* rule which shelters the Defendants in this case. Two other courts which have considered the effect of Section 27(A) on the finality of judgments have similarly concluded that constitutional principles have been violated. *In re Brichard Securities Litigation*, 788 F. Supp. 1098, 1106-07 (N.D. Cal. 1992); *Johnston, et al.* v. *Cigna Corporation*, et al., 1992 U.S. Dist. Lexis 3666, at *3 (D. Col. March 20, 1992).

The third argument the Court will consider is one not pled directly by the Defendants, but one that figures prominently in the cases cited by them. The issue before the Court is the same as that facing the court in *TGX Corp.* v. *Simmons*, 786 F. Supp. 587 (E.D. La. 1992),

> Once a court finds that a congressional enactment has changed the law, the court must then review the enactment itself, to assure that its substance does not constitute an impermissible legislative encroachment on the judicial power. Thus, because this court has determined that section 27(A) has changed the law, the court must now consider whether section 27(A) changes the law in a manner consistent with established separation of powers principles.

Id. at 592 n.5.

It is a longstanding principle that Congress may not enact a law that contravenes the Supreme Court's judgment on questions of constitutional interpretation. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see also Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1981). It is alone the prerogative of the judiciary to determine constitutional principles, which can not be altered or amended by the legislature.

As discussed above, Section 27(A) is aimed at abolishing solely the retroactive application of the *Lampf* rule. Moreover, the retroactive application of *Lampf* is largely the result of another Supreme Court decision issued the same day as *Lampf* in the case of *Beam*. The dispositive question, therefore, is whether the retroactive application mandated by *Beam* should be accorded the status of a constitutional principle.

Two other courts have tackled this question in determining the constitutionality of Section 27(A)—an admittedly complicated task in view of the plurality opinion of the Justices in *Beam*. *See Brichard*, 788 F. Supp. at 1108-12; *TGX*, 786 F. Supp. at 592-94. Both courts have concluded that the *Beam* decision reflects judicial interpretation of the constitution, and that Section 27(A) to the extent that it undermines retroactive application of the *Lampf* rule is unconstitutional.

The United States, however, argues that *Beam* is not a constitutional decision, and that even if it is accorded such a status, it is binding only upon the judiciary and does not prohibit Congress from passing laws that alter the retroactive effect of court decisions.

In *Beam*, the Supreme Court held,

> The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it *must* do so with respect to all others not barred by procedural requirements or res judicata.

111 S. Ct. at 2448 (emphasis added). In issuing this mandate to all courts, the Supreme Court largely relied on the equitable principle that similarly situated parties must be treated

the same by the law, and on the case of *Griffith* v. *Kentucky*,[6] 479 U.S. 314 (1987), which previously employed the same principle in the criminal context. Departure from such equitable treatment strikes at the heart of the power of precedent, and undermines the integrity of the judicial system. *Beam*, 111 S. Ct. at 2447-51. In effect, the source of such a ruling can not be other than the constitution.[7]

Yet the question remains whether this constitutional principle was meant only to bind the judiciary and give free reign to Congress to alter the retroactive application of laws once they have been applied retroactively by the judiciary. The language quoted above on its face imposes a constraint only upon the judiciary. But the reasoning underlying the mandate must by necessity extend to Congress as well. Congressional action eliminating retroactive application of laws already applied retroactively by the judiciary suffers from the *same* two constitutional infirmities: it threatens the integrity and independence of the judiciary, and fails to treat like parties alike.[8]

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6. Unlike *Beam*, *Griffith* is not a plurality opinion and therefor lends itself to a more straightforward reading. *Griffith* explicitly premises its holding, identical to that of *Beam*, but in the criminal context, on "basic norms of constitutional adjudication." 479 U.S. at 322. These norms implicate two principles. First, the integrity of judicial review requires that the courts apply the same rule to all similar cases pending on direct review; and second, similarly situated parties must be treated the same by the law. *Id*. at 322-23.

7. Three of the Justices concurring in the judgment of the Court in *Beam*, in a six to three ruling, *explicitly* premise their holding on the constitution: Justices Blackmun, Marshall and Scalia. 111 S. Ct. at 2449-51.

8. This second infirmity takes life largely from the Court's earlier finding that final decisions can not be reinstated by Congress. Thus, parties subject to final judgments are precluded from reinstating their Section 10(b) claims, whereas "similarly situated" parties in pending actions can reassert their Section 10(b) claims.

This lengthy analysis, distilled, leads simply to this: The Supreme Court mandates retroactive application of laws once applied retroactively by the courts as a basic norm of *constitutional* adjudication. Thus, henceforth, any reformulation of this principle of retroactivity can occur solely at the hands of the judiciary, and not Congress.[9] This Court hereby aligns itself with the rulings in *TGX, supra* and *Brichard, supra*.

This Court can not sustain the validity of Section 27A in view of the fact that (1) it undermines the constitutionally protected rights once vested in Defendants by virtue of the final judgment entered in this case; and (2) it encroaches on the Supreme Court's provision for retroactive application of the *Lampf* rule as a constitutional matter.[10] In sum, Section 27(A) is unconstitutional.

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9. The United States argues that it is well settled that Congress can enact legislation to reverse the effect of a Supreme Court decision and require that the new law be applied retroactively to cases filed before that Supreme Court decision. *See, e.g., Tonya K.* v. *Board of Education of Chicago*, 847 F.2d 1243, 1247-48 (7th Cir. 1988); *Moore* v. *District of Columbia*, 666 F. Supp. 263, 264-65 (D.D.C. 1987), *aff'd*, 907 F.2d 165 (D.C. Cir. 1990) (en banc). These cases, however, are inapposite to the instant case. It is uniquely in *constitutional* pronouncements by the judiciary that the hands of Congress are tied.

10. On this same basis, Section 27(A)(a), which is not directly before us, is also constitutionally infirm by removing the retroactive application of the *Lampf* rule to pending cases. Section 27(A)(a) reads,

> **EFFECT ON PENDING CAUSES OF ACTION.** — The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed in June 19, 1991.

IV. Conclusion

Based on the foregoing reasons, Plaintiff Pacific Mutual's Motion to Reinstate Action is DENIED.

SO ORDERED.

DATED: July 13, 1992

/signed/

Barefoot Sanders, Chief Judge
United States District Court
Northern District of Texas